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## THE TIRUPATI TEMPLE AND CYPRES APPLICATION.

Much has been said and written about the application of the so-called *Cypres* doctrine both at the time when the Madras Hindu Religious Endowments Bill was discussed in Council and more recently when the Tirumalai-Tirupati Devasthanams Bill was discussed in the local Council. The Advocate-General, quoting some statement in an article in the MADRAS LAW JOURNAL, which itself was an extract from an article published in the *Hindu* when he was not a Law Officer of the Crown, had objection to the phraseology of a particular clause in the Tirumalai-Tirupati Devasthanams Bill. This objectionable expression, according to the Advocate-General, is to be found in cl. 37. There was no objection to any of the wordings in cl. 36. In this latter clause some contrast is made between "*administration* and *management*" with "the *maintenance*" or "with the *construction* and *maintenance*" of institutions or roads. We take it that the funds of a Devasthanam are *primarily* to be utilised for its *maintenance* and the *poojas* etc. and other *worship* to be conducted therein. This will be admitted to be the first charge. While cl. 36 refers to *maintenance* of educational institutions or *foundation* and *maintenance* of hospitals, choultries, etc., or the *construction* and *maintenance* of roads, when referring to the Devasthanams, it speaks only of their "*administration* and *management*". If sub-cl. (1) of cl. 36 had stated "the *maintenance*, *administration* and *management* of the Devasthanams" instead of merely "*administration* and *management*," it could have been said that the expenses for the due performance of the worship

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and other ceremonies and festivals according to usage and the Agamas would be covered by the expression "*maintenance*". Cl. 37 only speaks of the "surplus" and, therefore, the legislature should have made it clear that it is only the balance that may be left after amply providing for the pooja etc., worship, the performance of festivals and the proper maintenance of the Devasthanams that comes within the scope of the clause. No doubt the intention of the legislature is that it is only after ample provision made for the expenses connected with the Devasthanams any surplus is intended to be touched.

A writer in one of the local Dailies (*The Hindu*) states that these Devasthanams were subject to a scheme framed by the High Court and by the Privy Council and that the legislature should not do anything inconsistent with the provisions of the scheme. It is evidently forgotten that when the High Court was moved to give its sanction to the educational institutions founded by the Mahant for many years prior thereto, the High Court declared that the Mahant had no power to open such institutions and to expend moneys for the purposes of those institutions. But for the intervention of the legislature in 1914, some of the schools mentioned in the schedule to the present Bill would have been closed long ago. In that year a Bill was introduced into the local legislature to recognise these institutions and no objection was taken to the spending of the Devasthanam funds for these schools at the time. Since then two other schools were opened at Tirupati and the present Bill recognises them and says that the expenses connected therewith are a proper legitimate charge on the Devasthanam funds. The purposes referred to in sub-clauses (*ii*) to (*vi*) of cl. 36 are all purposes connected with the temple intended to give facilities to worshippers and to promote the worship and the clause enacts that the funds of the Devasthanam may be utilised for those purposes. It would have been better and indeed no orthodox minded person could have felt that the legislature was going out of the way if the draftsmen could have expressed the intention of the legislature more clearly. If cl. 36 of the Bill had been worded thus:—"The funds of the Devasthanam, after making due and proper provision for the daily and other worship and the performance of the ceremonies and festivals etc. according to usage and Agama Shastras and for proper maintenance, administration and management of the Devasthanams and their properties,

may be utilised as follows, *viz.*, "the maintenance, administration and management of the educational institutions referred to in Sch. II" etc., there could have been no legitimate objection raised. But, as it is, the Advocate-General or anybody else in the local Council had no objection to the wording and phraseology of this clause. If the High Court or the Privy Council scheme was not to be touched, these institutions in Sch. II would go. Again, the Madras Full Bench decided that the clause giving the High Court liberty to apply for modification of the scheme or to the District Court for varying the rules was *ultra vires*. There is no point in saying that the scheme is sacrosanct and should not be touched. As recognition of the schools was by statute it is only just that another statute should deal with them.

The Advocate-General, as stated already, had objection to the double negative employed in cl. 37 as going against the doctrine of *cypres* and he referred in support of his objection to an article that he wrote in the MADRAS LAW JOURNAL (51 M.L.J.) and stated that the clause would contravene the doctrine of *cypres* as understood in the English Courts of Equity and applied by those Courts to charitable trusts. In that article he also stated that the English Courts made a distinction between *religious* and *non-religious* trusts and that a *religious* purpose is not akin to a *non-religious* purpose and that funds devoted to religious and charitable purposes could not be applied *cypres* to non-religious, such as educational purposes.

Whatever may be the point in the objection to the enactment of S. 67 of the Madras Hindu Religious Endowments Act, we think it is not relevant to the specific clause dealing with the funds of the Tirumalai-Tirupati Devasthanams. The learned Advocate-General knows well enough that the doctrine of *cypres* has application only to funds dealt with or properties endowed by *wills* for charitable purposes. *Santana Ray* v. *The Advocate-General of Bengal*[1]. It has no application whatever to the case of the Tirumalai-Tirupati Devasthanams whose properties consist largely of the votive offerings of the worshippers, of the accumulation of funds from such votive offerings, of purchases from such votive offerings and of grants made by former Rulers, Zamindars, etc. At the time of

1. (1920) I. L. R. 48 C. 124 at 135: 32 C. L. J. 453.

Madras Act III of 1914, the accumulations from votive offerings came to 60 lakhs. Since then these had considerably increased and large landed properties have been purchased.

No doctrine of *cypres* is invoked by the legislature in enacting cl. 37. No distinction is made in the Hindu Law between *religious* and *secular* charitable trusts. *See* West and Buhler, Hindu Law, pp. 306 and 307 (*n*), 3rd edition; *I. Indian Law Quarterly*, p. 118 and *Muthukrishna Naicken* v. *Ramachandra Naicken*[1]. *See also* Ganapati Aiyar's Hindu and Mahomedan Endowments, pp. 23, 53, 54 and 206, so that the analogy of the English Law has no application. If the legislature was right in enacting Madras Act III of 1914 and recognising the educational institutions started and conducted by the Mahant on his own initiative and we think the legislature was perfectly right in doing it, there could be no objection in enacting sub-cl. (*iii*) of cl. 37 as worded therein. We do not say that even if the words "not inconsistent" were omitted and the word "consistent" was employed there would be any difference. Apparently those who objected to the change of phraseology thought that they might be taking some risk with reference to the construction of S. 67 of the Madras Hindu Religious Endowments Act II of 1927. We think this section of Madras Act II of 1927 has no bearing whatever. In cl. 37 there is no question of any application of any doctrine of *cypres*, while S. 67 of the Madras Act II of 1927, which deals with all temples, may be said to enact some doctrine of *cypres* as it could not be predicated whether all endowments of temples coming under the scope of the Act are of the character dealt with by the legislature as regards Tirumalai-Tirupati Devasthanams. Courts have to deal with particular definite purposes stated before them and it is just as difficult or easy to determine whether those purposes are "consistent" with the purposes of the temples as it will be difficult or easy to say whether those purposes are "not inconsistent" with the purposes of the temples.

If the doctrine of *cypres* has no application, it may be said there is no legitimate scope for applying in the manner the legislature has done, though the Advocate-General did not object on that ground. Let us consider what the legislature

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1. (1918) 37 M. L. J. 489 at 502, 503 and 506.

intends by the enactment of cls. 36 and 37. If, as a matter of fact, any property is endowed for any specific services of the idols in the Devasthanams, there may be something to be said in the objection that it is highly objectionable to divert the funds intended by the donor for one purpose to another purpose. But the legislature has not in cls. 36 and 37 touched any specific endowments. Cl. 36 speaks of "the funds of the Devasthanams" and cl. 37 deals with the surplus funds of the Devasthanams. Both clauses do not use the term "endowment" which is defined in the Act as meaning "all property belonging to, given or endowed for the support of the Devasthanams or for the performance of any service or charity connected therewith and includes the temples and any offerings made to the idols therein". Now in this definition two kinds of properties are dealt with: (1) what may be called general endowments, and (2) what may be called specific endowments. It is the former class that is dealt with in cls. 36 and 37.

With regard to the general funds, an illustration is given in the definition itself, *viz.*, offerings to idols. What is the intention with which these offerings are made. Certainly, no specific purpose is intended when the public make these offerings. They go to the general coffers of the Devasthanams and augment their income. So are the various funds of the Devasthanams which have been endowed by others and are intended for all the general purposes of the Devasthanams. In the case of properties purchased out of the accumulations of the votive offerings they are the properties of the Devasthanams intended for application for all general purposes.

Now the purposes of the temple are various. No doubt the *primary* purposes are the upkeep and maintenance of the Devasthanams, the expenses connected with the daily and other worship of the idols, the expenses connected with periodical festivals and processions etc. As *ancillary* to these purposes, certain other purposes follow, such as expenses in connection with persons who have to perform the worship etc., the establishment etc.

There are, however, other purposes of a temple which may not be *primary* but which are *quite proper* purposes of a Hindu temple. Now schools for the spread of religious learning, for improving the knowledge of the Agamas and Tevarams, Tamil prabandhams etc. and for recitation of Vedas etc. are proper

adjuncts of a temple and come within the scope of temple charities. Indeed the Advocate-General had no objection to the provisions of cl. 36 at all. No question of any *cypres* application properly arises in such cases. Schools for *secular* education have been sought to be distinguished by some persons who have had western education. It is sought to distinguish between *religious* from *secular* charities and it is stated that a *temple* being a *religious* charity there can be no justification for utilising *temple funds* for *secular* purposes. This, however, is quite a mistaken notion. The Hindu Law makes no distinction between religious and non-religious purposes. As stated by Messrs. West and Buhler " religious and charitable purposes are coupled together in the Hindu authorities". (3rd Ed., pp. 206, 207 (*n*). See *I. Indian Law Quarterly*, p. 118.) Apart from this, according to the Agama Shastras, "a temple has attached to it a tank, a grove, a choultry, a school and a lecture-hall". The Uttara Kamika Agama in Chapter 67 states that seats of learning should be established in temples and that the teaching in these should be in Sanskrit and Dravida languages. The Supra Bheda Agama in Chapter 36 stated that provision should be made for teaching and expounding all the Vedas, Chandas, Sastra, Jyotish Shastra, Siksha, Kalpa, Nirukta, Vyakarana, Saiva Siddhanta, Pasupata Siddhanta, Soma Siddhanta, Buddha faith, Arhata faith and Pancharatra. The question has been dealt with in *I. Indian Law Quarterly*, pp. 119 and 120.

The above purposes of a temple will show that a trustee is quite within his rights in spending for all or any of these purposes without any authority from Court if he has got funds enough for the same. There is no question of any application of the doctrine of *cypres* in such cases which can only be done under the authority of Court. That Hindu Rajas prior to the British advent regarded the temple purposes or purposes of choultries as *various* and applied the funds to establishing *dispensaries, schools of learning*, etc., will appear from the letter of the Rajah of Tanjore extracted by *Seshagiri Aiyar, J.*, in *Muthukrishna Naicken* v. *Ramachandra Naicken*[1]. In the *Dakore Temple case*, an *English* school and a *Sanskrit* school were directed to be established by a scheme framed by the Bombay High Court and provision was made for meeting the

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1. (1918) 37 M. L. J. 489 at 501 and 502.

expenses of the same from the temple funds. When the scheme was first framed a *dispensary* and a *school* were provided for. See *Ganapat Rao* v. *Ramadhin Doss*[1]. When the case came before the High Court a second time, besides the dispensary, an English school and a Sanskrit school were directed to be established. [(1879) 4 Unre. P. J., Bom. H. C., p. 471 at p. 491.] The Judges who directed the establishment of these schools (*Westropp* and *West, JJ.*) and the Counsel who appeared in those cases (all of whom were eminent Hindu lawyers) never felt that there was any objection in utilising temple funds for these purposes. After the Hindu Sovereigns, when the British Government became connected with the management of these institutions they utilised the surplus funds for the construction of roads and bridges and for expenses of education. See the papers from the Parliamentary Blue Book on Idolatry dealt with in *I. Indian Law Quarterly*, pp. 125 to 132. No Hindu and there must have been more Sanatana orthodox Hindus in those days than now ever objected that such application was diverting temple funds or was improper. On the other hand, people still appeal to those days and to the management of Government as the best in the history of these religious institutions.

The question has been dealt with in *Muthukrishna Naicken* v. *Ramachandra Naicken*[2]. *Seshagiri Aiyar, J.*, in an elaborate judgment discussed the question and has come to the conclusion that such application is proper and legitimate. That was a case of devise and the testator directed his property to be given for distribution of *thaligai* in various temples in which he was himself performing similar charities during his lifetime. In the course of his judgment the learned Judge observed (pp. 505-506):

> "The donations made to a deity often take the strictly legal aspect of charity as understood by English lawyers. Grants for feeding the devotees, for giving them shelter, for giving them water are made in connection with religious institutions. Grants are frequently made to reward persons who chant the Vedas or the *prabhandam* when the *utsavams* are in progress. I cite these instances to show that in the eyes of a donor, the feeding of the poor and the encouragement of educated men are regarded as purposes gratifying to the deity. If that is so, how can a management be charged with misapplication, if it uses the surplus funds to enable young men to gain knowledge or to give them food while reading in schools and colleges."

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1. (1874) Unre. P. J., Bom. H. C., Vol. II, p. 277.
2. (1918) 37 M. L. J. 489.

It will thus be seen that when owing to change of conditions and circumstances or the progress of time the income of properties belonging to a temple increases and there are innumerably large votive offerings by devotees and surplus accumulates, it is legitimate for a trustee to apply the same among others to schools etc. where secular instruction is taught and that the legislature in enacting cls. 36 and 37 only intends to restrict the powers of trustees to spend as they please and to give certain general principles which should guide them just as Courts would do by framing a scheme.

It is then said that by promiscuously utilising temple funds in this way, the people who want to utilise the same will only be killing the goose that lays the golden eggs and that votive offerings of devotees will cease and no scope for application of any surplus. In the first place, people who are in this way of thinking forget that the faith of the devotees and their motives in making such offerings do not in the least depend on the way in which their gifts are applied. If the faith of the Hindu people has not been in any way shaken and the offerings have not ceased in spite of the notorious misappropriation and scandalous mismanagement of the previous Mahants, it is not going in the least to be shaken by the fact that they would see that their gifts would be utilised for various public benefits. Indeed the determination and making of the vows which result in the votive offerings to the Tirupati Deity do not depend on the application of the gifts and arise irrespective of such application.

In the second place, in the case of caste institutions where trustees are influential and charges of mismanagement and breaches of trust are brought forward against them and it is sought to remove such defaulting trustees, it is often a stock *argument* in favour of such trustees that if they are removed the income of the institutions will suffer. The answer of *Scott, J.*, is well worth perusal. In *Thackersey Dewraj* v. *Hurbhum Nursey*[1] :

"It has been stated more than once, in the course of the case, that, if these present trustees are removed from their post, the subscriptions and offerings to the temple will fall off. Of course I am bound to have regard to the question whether the appointment of new trustees will promote or impede the execution of the trust. But I am sceptical about the threatened result.

1. (1884) I. L. R. 8 Bom. 432 at 471.

Other men of the caste, of position and respect will be found, I do not doubt, to take the place, and the votaries will renew their offerings when the temple affairs resume their normal state. But, however that may be, I cannot allow an evil precedent to be established and the maladministration of a public trust to go without redress, because the wrong-doers are men of influence, leaders of the caste, able to persuade a number of private persons, members of the same caste, to throw a cloak over the abuse. The management of the temple can be conducted on the income of the accumulated fund alone if placed in safe hands. The worst consequence, if no offerings were made, would be the absence of a surplus. Surpluses, in the past, have not been much devoted to the charitable objects of the funds to which they are subscribed. It is evident from the amount of the accumulated fund, that very little has been dispensed in charity, and the increase of the temple store is not a very important object. The threatened consequence is not sufficient to deter the law from taking its course."

Applying the above to the present case, we are not merely very *sceptical* about the *threatened* result but hope that human nature is neither so calculated nor so degraded as to lead to induce faithful devotees to abstain from making vows or to be less generous in their contributions. Indeed, as observed already, the motives of people in making vows do not depend on the consideration what will happen to their gifts when made but on other considerations personal to themselves. These offerings far from having fallen have increased with the growth of time notwithstanding the embezzlement of vast sums of money by previous Mahants. We have no doubt that the new management will afford all possible conveniences and even luxuries to people who visit the Devasthanams and make their offerings and will be solicitous about their conveniences and welfare. We hope also the application of the surplus to a University of Oriental Learning and Research to be established will promote more people to contribute their mite to the funds of the Devasthanams so that they may also feel that they are contributing to the public benefit.

It was the right of the Sovereign in the exercise of superintending authority, prior to the giving up of the British connection, to direct the application of the surplus to purposes which are within the scope of temple charities. The Local Government have by this legislation left it to a particular body to exercise this right. We hope that this body will have true regard to the various purposes of the Tirupati Devasthanams and will direct the application in such a way as will promote those objects and as no Hindu devotee will regard with abhorrence. At any rate they will do nothing to shake the

faith of the Hindu devotees upon which of course depends the future income of these Devasthanams.

P. R. GANAPATHI IYER,
*Advocate, Madras High Court.*

## SUMMARY OF ENGLISH CASES.

*In re* GEORGE INGLEFIELD, LIMITED, (1933) 1 Ch. 1.

*Hire-purchase agreements—Company—Voluntary winding up—Agreements with a discount company to finance—Assignment to the discounter of goods subject to the hire-purchase agreements—Nqn-registration of under the Companies Act—Whether invalid.*

G. I. Company carried on business in furniture and from time to time they made what are called Hire-Purchase Agreements with their customers, and for the purpose of obtaining money they entered into a contract with the discount company, whereby that company agreed to make certain payments to them. The question was whether the sums which became due under hire purchase agreements were charged to the discount Company by G. I. Ltd., and therefore required registration and in default of registration was void as against the liquidator. The effect of the agreement was that G. I. assigned to the discount company the goods which were the subject-matter of the hiring agreement, together with the rights which G. I. had as against the hirer. It also provided that after the discount company shall have received from the hirer or the dealer G. I. in respect of all the hire-purchase agreements comprised in the assignment, sums amounting in the aggregate to the purchase price paid by the discount company under the terms of the assignment, that company is to allow the dealer G. I. to retain all the subsequent instalments of rent, or other moneys, due from the hirer, etc.

*Held,* that the transaction was one of assignment to the discount company and not merely one of charge. Though the legislature has been careful to safeguard all persons having dealings with a limited company by providing for the registration of any charge over its assets, it has not introduced the doctrine of reputed ownership into the winding up of companies. There is nothing to prevent a limited company from selling its assets without giving notice of it to the public.

*In re* SIR THOMAS SPENCER WELLS. SWINBURNE HANHAM *v.* HOWARD, (1933) 1 Ch. 29.

*Crown—Bona Vacantia—Mortgagee—Dissolution of Company before 1929—Mortgagee if trustee of equity of redemption—S. 296, Companies Act, 1929—If retrospective.*

A company mortgaged its interest in three leasehold properties to *W* in 1899 and assigned to him, the whole of the unexpired residue of the terms for which they were held subject to the usual proviso for redemption. It covenanted also to repay the mortgage amount with interest at 4 % per annum. In 1910, the company went into voluntary liquidation and a liquidator was appointed. In 1916 the company was dissolved but as then there was a large sum due to the mortgagees and the net rents were insufficient to pay the full interest on them, the liquidator thought the equity of redemption was of no value, and he took no steps to either surrender it to the mortgagees or sell or dispose of it to any other person. After dissolution, the rents had largely increased in value and the arrears of interest was largely paid off therefrom. The equity of redemption had become of value. The crown claimed to be entitled to the equity of redemption as *bona vacantia*, while *W* claimed to be entitled to the property free from any equity of redemption as survivor of the mortgagees to whom the property had been assigned.

*Held*, that the right of the crown to *bona vacantia* can be applied to an equity of redemption of leaseholds, which is not vested in any specified person; for it is not to be considered as a mere equity. The right of the crown to succeed to the personal estate vested in a company at the time of its dissolution does not differ in substance from the right of the crown to succeed to the personal estate of a person dying intestate without next of Kin. In both cases the title of the crown arises because the property has no other owner; such property must not be confused with property the owner of which is unknown. The difference between the case of an intestate and of a dissolved company is purely one of form. S. 296 of the Companies Act, 1929 is not retrospective.

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*In re* AIREDALE GARAGE COMPANY, LIMITED: ANGLO-SOUTH AMERICAN BANK, LIMITED *v.* THE COMPANY, (1933) 1 Ch. 64.

*Company—Receiver on behalf of debenture holders—Payment of rates under S. 264—If rates due as then fixed or rates declared subsequently to be due by an increase in the rate—Additional rate also if payable before debentures—'Due and payable within 12 months next before'—Meaning of—Companies Act, 1929, Ss. 78, 264.*

In exercise of a power contained in the debentures, a receiver G.W. was appointed of a company's assets and undertaking on 28—1—1931. For the period between April 1, 1930 and January 28, 1931, a premises belonging to the company was assessed at *72l* for rating purposes. On appeal by the Revenue officials the rateable figure was increased from *72l* to 212*l* on November 13, 1931. Under

S. 264 of the Companies Act, 1929 it is enacted that in a winding up there shall be paid in priority to all other debts (*inter alia*), all parochial or other local rates due from the company at the relevant date and having become due and payable within twelve months next before that date. The question arose if even the increased rate was entitled to priority, the contention being that it was determined that he was liable to pay that amount only on 25—9—1931, and that was not within the period of twelve months before the relevant date January 28, 1931.

*Held*, that though the determination of that liability was in respect of the rates which fell to be paid between April 1, 1930 and January 28, 1931 date of appointment of the receiver, yet the rate in question was part of the additional rate for that period. It was not finally measured until a date subsequent to the twelve months referred to in S. 264. In the case of a revision, the amendment is to have effect as from the commencement of the period in respect of which the rate was made. This rate therefore became operative from April 1, 1930 and was therefore entitled to priority over the debenture holders. The words 'due and payable' in S. 264 are meant to refer to a liability in respect of which there had to be a payment, and the particular debt for additional rates must be deemed to have become due and payable within the period of the twelve months next before the relevant date.

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*In re* MONROS' SETTLEMENT. MONRO *v.* HILL, (1933) 1 Ch. 82.

*Construction—Marriage settlement—Trust for payment of income to wife after her husband's death "during her life or until she shall marry again"—Dissolution of marriage by Court—Remarriage by wife while husband still alive—If wife takes under the clause.*

By a marriage settlement property was assigned to trustees with a provision that from and after the husband's death the trustees shall pay the annual income of the property unto his wife if she shall survive the said husband during her life or until she shall marry again. The marriage was dissolved on the petition of the wife in 1916 and the wife remarried another in 1930. The husband of the settlement died in 1932. The question arose if the wife took under the clause in spite of her remarriage.

*Held*, that the trust arises only upon the death of the husband, and the words " until she shall marry again" are words of futurity, *prima facie* applying only to marriage after the husband's death. The remarriage which took place during his lifetime does not come within the defeasance clause and the wife is therefore entitled to the income until she marries again.

*Fitzgerald* v. *Chapman*, 1 Ch. D. 563 relied upon.

ATTORNEY-GENERAL *v.* CORKE, (1933) 1 Ch. 89.

*Nuisance—Owner of a field—Allowing a caravan party—Nuisance by—Liability of land owner—Injunction.*

An owner of a disused brickfield began to license persons who live in caravans to place their caravans on the field and to live in them there for rent. A number of caravan dwellers so occupied the field. They led a nomadic life and their habits was a menace to the neighbourhood. They threw slop water and deposited human excrement upon the neighbouring land and fouled in various other ways. They were making heavy noise, fighting, using bad language and so on. They permitted their horses to trespass on the adjoining lands and damage property. The Attorney-General at the relation of the Rural District Council having authority over the land applied for abatement of nuisance.

*Held*, the acts were such as to endanger the health of those who live in the neighbourhood. It is not unlawful for a person to grant licenses to caravan dwellers to place their caravans on his land. But in bringing on to his land, for his own profit, a number of people who dwell in caravans, the owner puts his land to an abnormal use. The principle of *Rylands* v. *Fletcher*, L. R. 3 H. L. 330 applies and the owner becomes liable for the nuisance of the occupiers and an injunction can be granted against him restraining him from allowing the occupants of the camps to do the specific acts complained against.

*N.B.*—The order has also been set out at the end of the judgment in the Report at p. 96.

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*In re* DE CARTERET. FORSTER *v.* DE CARTERET, (1933) 1 Ch. 103.

*Will—Charity—Trust for providing annual allowances for widows below a certain income—Preference to widows with young dependant children on them—Validity of.*

A testator by his will bequeathed a sum of 7000*l* to *F* and *S* upon trust " to invest the same . . . . and to use the income thereof in providing annual allowances of 40*l* each to widows or spinsters in England whose income otherwise shall not be less than 80*l* or more than 120*l* per annum . . . . . Preference shall be given to widows with young children dependant on them. . . . . . ."

*Held*, that this was a case of a gift to trustees for the purpose of relieving persons of limited means—here persons whose means are between 80*l* and 120*l* per annum—whose circumstances are such that it is very reasonable that some contribution from the bounty of the testator should be made to them to enable them to

carry out their duties as citizens. Such an object is a good charitable object and the gift is therefore good.

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*In re* CHAPLIN NEAME *v.* ATTORNEY-GENERAL, (1933) 1 Ch. 115.

*Will—Charity—Home of Rest—If a charitable bequest.*

By his will, *C* (the testator) declared that his trustees should stand possessed of a freehold house and residue of his estate "on trust for the purposes of and to establish and found a charity and by means of the same run a charity having the following objects, namely: to provide a Home of Rest that shall afford a means of physical and mental recuperation to persons in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live and for work. It further added that "the trustees shall . . . . . apply to the Chancery Division of the High Court of Justice or to the charity commissioners for a scheme in respect of the said charity . . . . In considering the suitability of a candidate for admission to the home, his or her need and the economic situation of the charity shall, but the financial position of the candidate shall not, be taken into account.

Any person admitted to the home may be required to pay for his or her board and lodging and other benefits received by him or her according to his or her means . . . . . Fees for medical attendance and for treatment to be paid for by the patient where reasonably possible but if thought by the trustees to be necessary or desirable the trust funds may be drawn upon for such fees to a reasonable extent."

*Held* following *In re* James, (1932) 2 Ch. 25 that this was a good charitable trust. If anything this is stronger than *In re* James.

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*In re* COSSENTINE. PHILP *v.* TRUSTEES OF THE WESLEYAN METHODIST. LOCAL PREACHERS' MUTUAL AID ASSOCIATION, (1933) 1 Ch. 119.

*Construction—Will—Bequest "to be divided between* A *and the heirs of my brothers and sisters"—Two sisters and heirs of brother alive at dates of will and Testator's death.*

By his will *H*, the testator after bequeathing various pecuniary legacies proceeded as follows:—"The rest of my property of whatsoever kind I give to my wife and after her decease to be divided ***between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters.*** " At the date of the will the testator had two sisters living each of whom had one child also living on that date. He had one brother who was dead at the date

of the will but had left a wife and one child living at the date of the will.

*Held* following *In re* Dale, (1931) 1 Ch. 357 that the gift "to the heirs of my brother and sisters" was in effect, identical with a gift "to the heirs of my deceased brother and sisters" and must be construed as a gift "to my sisters and the heirs of my brother" and not as being a gift "to the heirs of my brother and the heirs of my sisters." The gift "to the society and the heirs of my brother and sisters" is a gift to be divided between the charity, the sisters, who were alive at the testator's death, and the daughter of his deceased brother in equal fourth parts.

*In re* HARPER, (1914) 1 Ch. 70 relied on.

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COUSINS *v.* SUN LIFE ASSURANCE SOCIETY, (1933) 1 Ch. 126.

*Insurance—Policy effected by husband on his life—Policy declared as for the benefit of wife—Death of wife during husband's lifetime—Destination of the Policy.*

A husband effected with the defendant company two policies of insurance on his own life for 15000*l* and 3000*l*. Each policy contained a declaration that the policy was issued for the benefit of L. C. the wife of the assured; under the provisions of the Married Women's Property Act, 1882. From the covenant to pay, the words "to the person to whom this assurance is granted or his executors, administrators or assigns" are struck out in each policy and no other payee is named. L. C. died leaving a will and the question arose as to who was entitled to the policy amount, the husband or the wife's personal representatives.

*Held* by Eve, J. that the effecting of the policies created a trust in favour of L. C. in the event of her surviving the assured. Her interest was only a contingent one and on her death in his lifetime the trust failed for want of any continuing objects and the moneys payable thereunder became the property of the assured.

*Held* (on appeal reversing Eve. J. that she took a vested interest in the policy moneys when the policy was created. On the plain terms of the policy there remains the trust to pay over the moneys due under the policy to the executors of L. C., with the result that the trust in her favour was not ended by her death and the interest passed on her death to her executors as part of her estate.

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TOWNSHEND *v.* CHILD, (1933) 1 K. B. 181.

*Husband and wife—Action by widow against third party for damages—Remarriage of widow pending action—Action going against widow—Order for costs—Amendment of cause title.*

The plaintiff, a widow of *T*, brought an action against the defendant for damages for alleged negligence as a professional man. Before the evidence for the defendant was concluded, the jury stopped the case, as they felt the defendant had not been guilty of negligence. The Judge agreed with their view. At the time of the institution of the suit in 1930, the plaintiff was a widow. In 1932 before the decree she remarried one *B*. The Judge therefore directed amendment of the cause title to *T*, widow (married since action brought, namely, on March 23, 1932 to *B*)." The question arose as to the proper form of the order as to recovery of costs in view of the fact that subsequently she remarried.

*Held*, that the judgment against the plaintiff should be in the form of *Scott* v. *Morley*, 20 Q.B.D. 132, as recognised and applied by the Court of Appeal in *Birmingham Excelsior Money Society* v. *Lane*, (1904) 1 K. B. 35 and that the costs against the plaintiff shall be recoverable against her separate estate, whether subject to restraint on anticipation or not.

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HALL *v.* BROOKLANDS AUTO RACING CLUB, (1933) 1 K. B. 205.

*Negligence—Race course—Motor race—Spectator on payment —Accident to—Liability of owners of the race course.*

The racing course at Brooklands is a kind of oval over two miles round, including at one part a long straight stretch over 100 feet wide. On the right hand side, where many spectators stand, the course was bounded by a concrete Kerb 6 inches in height; on the far side of the Kerb was 4′ 5″ of grass, and then an iron railing 4′ 6″ high. The spectators are absolutely safe in the greater part of this ground, but as most of them like to get as near the racing as they can, they place themselves along the railing. There was a long distance competition. The plaintiff was a spectator having paid for witnessing the race. A car when in full speed at over 100 miles an hour swerved to the right and the hub of its off hind wheel touched the hub of the near front wheel of another car with the most startling result, namely that the blow threw the car through the air and fell and injured some spectators near the railings. The race course was in use since 1907 and this was the first time any spectator had been injured by a car leaving the track. In an action by the plaintiff, a spectator, for damages against the race course owners for injuries to him due to the accident, the jury held that the race course owners were guilty of negligence, in that being the owners of premises used for the carrying on of a highly dangerous sport at which accidents had happened and were likely to happen, they failed by notices or

otherwise (i) to give warning of or protection from the dangers arising from the sport (ii) to increase the height of the barriers and (iii) to keep the spectators at a safe distance.

*Held* on appeal that there is no absolute warranty by the company that the premises are safe, but only that reasonable skill and care have been used to make them safe. The person paying for the ticket to witness the race takes upon himself the risk of unlikely and improbable accidents, provided that there has not been on the part of the occupier a failure to take usual precautions. No person can be under a legal obligation to guard against that which he has no legal duty to anticipate, unless he is an insurer of the safety of his invitees. The company cannot therefore be held liable for this extraordinary event which they could not anticipate.

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OSBOURNE *v.* RICHARDS, (1933) 1 K. B. 283.

*Road Traffic—Proprietor of motor coaches—Letting of coaches—If hirer used them as 'stage carriages' or 'contract carriages'—Road license if necessary—Road Traffic Act, 1930, Ss. 61 and 72.*

*R*, a motor coach proprietor let out his coaches for hire to *T* foot-ball club who were to collect the fares from the passengers. It was found that though so hired it was driven by employees of *R* and fares also collected by them. Any one who came along could have boarded the coaches in the square and ridden therein to the foot-ball field and there was no notice on the coaches to show that they had been hired by the foot-ball club. A fixed hire was paid by the club to *R*. As no road service license was taken out by *R*, or *T*, a complaint was preferred against *R* in that he permitted a public service vehicle to be used without license. *R* contended that they were used as "contract carriages" within the meaning of Section 61, sub-S. 1 (*c*).

*Held*, that the said vehicles were used as 'stage carriages' and not as 'contract carriages' and therefore a road license ought to have been taken out. The vehicle was not carrying passengers stage by stage but for hire or reward at separate fares.

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MALONEY *v.* ST. HELENS INDUSTRIAL CO-OPERATIVE SOCIETY, LIMITED, (1933) 1 K. B. 293.

*Master and servant—Arbitration—Wages 'during periods of sickness'—Disablement by accident—If 'sickness' within the meaning of the clause.*

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*M* was a grocer's assistant in the employment of *H* Co-operative Society. His wages were *3l*, weekly. It was a term of the employment that during periods of sickness where absence from duty is properly vouched for by medical evidence, a particular rate of wage, different from that on duty, shall be paid. In the course of his employment with *H*, the assistant *M* crushed his thumb and was thereby incapacitated for work for 6 weeks, and the absence from duty was properly vouched for by medical evidence. The question arose if the employee was entitled to compensation under the agreement as during period of sickness. or as the Employer's contended under the Workmen's Compensation Act.

*Held*, that 'period of sickness' in the agreement included also period of disablement due to accident. The parties to the agreement were thinking about the case of a workman who for some reason was prevented from being on duty and deciding what he should receive as wages during that period. 'Sickness' includes incapacity due both to disease or bodily or mental disablement.

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DONKIN *v.* DONKIN, (1933) P. 17.

*Husband and wife—Summary Jurisdiction Act, (1848), S. 11 —Complaint of 'persistent cruelty'—Only one act within 6 months of complaint—If acts of cruelty prior thereto admissible.*

In July 1932 a husband assaulted his wife cruelly and she thereupon laid a complaint under S. 11 of the Summary Jurisdiction Act for 'persistent cruelty.' That was the only assault within 6 months, though prior thereto there were several cruel assaults. Under S. 11 'such complaint shall be made..within six calendar months from the time when the matter of such complaint..arose.' It was contended that there was only one assault within six months, and there being no other assault shown within six months, it cannot be said that there was persistent cruelty within six months.

*Held*, that the real question is not if within the 6 months he has been persistently cruel but whether the cruelty which is shown to have taken place within 6 months is part of a course of conduct —part of a course of cruelty—which was persistent. If a man keeps his wife in fear and subjection by threats, he is guilty of cruelty.

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## JOTTINGS AND CUTTINGS.

*Lord Wright Comes Down to Help Us.*—The surprise item was Lord Wright, sitting in Court IX, engaged, as of yore, in the hearing of Commercial cases. Rarely indeed, if ever before, has a

Lord of Appeal in Ordinary come down from the Lords and the Judicial Committee to do the everyday work of a puisne in a Court of First Instance. One might have thought that if such an exalted person desired to help with the arrears he would say to Scrutton or Greer or Slesser (L. JJ.): Here, you give me your list and you go off and help the L.C.J. in the Courts below. Yet such is not the mode. With the least disturbance possible Lord Wright laid aside his higher dignity and came down to Court IX to help us in the King's Bench Division, and at the time of writing he is proceeding quietly, unostentatiously and efficiently with the work. It is regarded as unlikely that he will be called upon later in the Lords to hear an appeal from himself.

Lords have, it is true, helped in the Courts of First Instance in the past. Lord Birkenhead, when Lord Chancellore did so. Lord Darling's service in Court IV is of recent date. But at the moment I cannot recall the case of a Lord of Appeal in Ordinary giving such lowly, yet noble, proof of his consciousness of the arrears.—*L. J., 1933, p. 46.*

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*Fifty Years Ago.*—A great judicial figure when the legal centre was moved from Westminster to the Strand was the first Lord Coleridge, who had been made Solicitor-General by Mr. Gladstone in 1868, and Attorney-General, in succession to Sir Robert Collier, in 1871. Law officers at that time were not precluded from private practice, and Sir John Coleridge, as he then was, had is full share of the best that was going. He shone brightly in two long-drawn-out cases: *Saurin* v. *Starr* and the *Tichborne case.* The action for ejectment was tried in the Common Pleas before Bovill, C.J. Coleridge was leader for the defendants, and with him were Hawkins, Honyman, Barber and Bowen. The two first and the last became, in the fulness of time, Lord Brampton, Honyman, J., and Lord Bowen. His opening speech occupied 23 days; and for three long weeks did Sir John cross-examine the claimant. "Though the cross-examination was considered lacking in startling or exciting episodes, no reasonable man at the end of it believed that the claimant was Roger Tichborne." The case had begun in 1871 and was stopped by the jury in the summer of 1873.

Killed, it is said, by the worries of the Tichborne trial, Bovill. C.J., died in the November following, and Sir John Coleridge succeeded him as Chief Justice of the Common Pleas. In January, 1874, he was created Baron. It was in 1880 that he became Chief Justice of the Queen's Bench with title of Lord Chief Justice of England. He died in 1894.—*L.J. 1933, p. 46.*

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*The Citation of Scottish Cases.*—Lord Macmillan contributes a useful note to the current *Law Quarterly Review* on the above subject. He points out that many English lawyers, in their ignorance of the Scottish formula for describing married women, by which Miss Ann Smith, when married to John Jones, becomes, for the purpose of all legal documents, Mrs. Ann Smith or Jones, are mystified by the double appellation which they seem to regard as a sort of alias, with the unfortunate result that the first or maiden name only is not unseldom quoted in English reports, as has already happened in the case of *McAlister (or Donoghue)* v. *Stevenson.* Although this journal must plead guilty to *"Mc Alister's case"*, albeit in good company, which, it appears, does not exclude members of the Court of Appeal, the proper designation of the parties is, as the writer emphasises, *Donoghue* v. *Stevenson*, the maiden name being relegated to an appropriate oblivion. As Sir Frederick Pollock suggests in an article elsewhere in the *Review*, with the picturesque title "The Snail in the Bottle and Thereafter," the case would probably have achieved immortality in those old days when tables of cases were yet in their infancy as "The Snail's Case," as even *Langridge* v. *Levy* is to many merely "The Gun Case," but nowadays a description is demanded at once more precise and less colourful. That being so, it is to be hoped that the reporters on this side of the Border will, in the interests of uniformity of citation, consent to accept the counsel of Lord Macmillan, and refer in future to such appellants, or, it may be, respondents, by their married names only. In the same note his Lordship refers to another and surely less excusable mistake. Need it be pointed out that the Scottish official reports are Session —(not Sessions)—Cases?—*1933, L.T., p. 40.*

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*Masters in the Chancery Division.*—The office of Master of the Supreme Court on the Chancery side, to which Mr. William Francis Spencer Hawkins has just been appointed to fill the vacancy created by the retirement of Mr. Watkin Williams, is one of the comparatively few posts in the Courts for which members of the solicitor branch of the profession are alone eligible. The present race of Masters are not the lineal descendants of the old Masters in Chancery, who went back, if not to a time during which the memory of man runneth not to the contrary, at least to a very early period in our legal history. In Bacon's time, as we are remained in Mr. John Ritchie's scholarly introduction to the Reports of Cases decided by Bacon during the years 1617-1621, there were then eleven Masters, two of whom usually sat in Court with the Chancellor or other judge in readiness to give assistance if called upon.

After a certain period of service they were usually rewarded with knighthood, and in some instances the Mastership was a stepping stone to the Bench. Many notable lawyers served the office, including one in later days, namely, Sir William Horne, who had been Attorney-General, and who apparently was content to subside into this not unimportant yet subordinate position. The old Masters in Chancery were abolished by 15 & 16 Vict. c. 80, which, after reciting that "whereas proceedings before the Masters in Ordinary of the High Court of Chancery are attended with great delay and expense, and it is expedient that the business now disposed of in the office of such Masters should be transacted by and under the more immediate direction and control of the judges of the said Court," proceeded to abolish the office of Master, to empower the judges to sit in chambers for the despatch of business, and to enable them, with the approbation of the Lord Chancellor, to appoint two Chief Clerks to be attached to each judge for the purpose of assisting in the work of the Court. Under the Act the qualification for the office was that each appointee should have been admitted a solicitor and should have practised as such for at least ten years immediately preceding his appointment. The duties attaching to the office are highly onerous, much more so than might be assumed to be the case from the fact that for so many years it carried merely the comparatively humble title of Chief Clerk, and this would appear to have struck those in authority, for in 1897 the status of the Chief Clerks was enhanced by their being transformed into Masters of the Supreme Court in the Chancery Division. Their colleagues in the King's Bench Division are all drawn from the ranks of the Bar.—*S.L.J., 1933, p. 37.*

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*Brawling in Church.*—The decision of the Penzance bench of magistrates to dismiss the summonses taken out against twelve persons for brawling in church by disturbing divine service at the churce of St. Hilary, Marazion, the scene of the faculty "raid" last summer is, whatever may be one's view of the alleged reason for the disturbance, an unfortunate one. On the facts it appears to be wrong in law, and we now understand that a case will be stated for the opinion of the King's Bench Division. The charge was brought under S. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, under which any person guilty of riotous, violent or indecent behaviour in any church or chapel, whether during the celebration of divine service or at any other time, or molesting or disturbing any preacher or clergyman ministering any divine service, rite, or office in any cathedral church or chapel, is liable to a penalty not exceeding £. 5 or imprisonment for two months.

There was uncontradicted evidence of organised interruption and disturbance by about seventy people by singing hymns and otherwise, and the disturbance began, before the actual service commenced, as the officiating priest and his assistants were proceeding to the alter for a sung celebration of Holy Communion. So far as the form of service is concerned, there was no evidence of any particular departure from the Prayer Book, but it would appear that the interrupters were led to expect a form of which they disapproved; and if such a service took place, the noise, according to *The Times* report, was such that not a word of it could be heard in the body of the church. In the meantime the police had been called in and endeavoured to collect the names of some of the disturbers. The magistrates appear to have accepted the defence put forward that the service interrupted was not a divine service according to law. In this respect they would appear to have undertaken a jurisdiction which more properly belongs to the Bishop and the Chancellor of the diocese, and in any event to have misconstrued the Act under which the charges were made, for the section expressly applies to brawling, not only in service time, but at any other time. The fact that, in cross-examination, the priest in charge would not admit the jurisdiction of a secular Court in ecclesiastical matters was irrelevant, though no doubt to the lay mind significant where the assistance of the secular court is being asked; the prosecution was a matter of common law, and it has further been held that provocation or a claim of right is no defence to a charge of brawling: *North* v. *Dickson*, 1 Hagg. Ecc. 730; *Kensit* v. *Dean of St. Paul's* [1905] 2 K. B. 249—*S. L. J., 1933, p. 38.*

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*The Lawful English Use.*—There is however a way by which these deplorable ceremonial disputes in the church can be reasonably settled, and that is by adherence to and acceptance of the principles of the Prayer Book and the ancient English use implied in the Ornaments Rubric. These principles are admirably set forth in the recent judgment of Chancellor Errington in the case of *St.Saviour's, Hampstead*, (1932) P. 134, which well deserves study. The vicar of the parish had introduced six candlesticks on a retable or shelf behind the altar, and objection having been taken, mainly on the ground that two old candlesticks given by a former vicar had been removed, proceedings to obtain a faculty were initiated. The Chancellor in a reserved judgment held that two of the new candlesticks should be retained in use, but disallowed the remaining four. The decision was that the old English use being to place not more than two lights on the Holy Table in service time, this was retained at the Reformation, and is authorised by the Ornaments Rubric,

consequently the use of six lights is unlawful. It might be added that as retables were unknown in pre-Reformation times, the lights should properly be placed on the altar itself and not on any shelf behind it. The Chancellor further held that it was quite lawful and proper to place a crucifix so as to be visible to a penitent during confession—a decision which would have astonished some of the judges of the nineteenth century. It may not perhaps be generally realised that there are not two, but three, different "shools of thought" on these matters—(1) the Protestant view, which regards the Prayer Book as complete in itself, and prohibiting any ornament or ceremony which it does not expressly mention; (2) the extreme Anglo-Catholic view under which many clergy have supplemented the somewhat meagre directions of the Prayer Book by wholesale borrowing from the Roman rite as being easily ascertained; and (3) those Anglo-Catholics and scholarly churchmen who regarding the book as an historical document, authorising the use of an elaborate ceremonial in its proper place, where it is desired, are careful in every detail to adhere to the ancient English use, which now, for the first time, has been definitely approved in a legal decision. The English customs may be studied at Westminster Abbey, and at many other well-known churches in London. Those who would like to study the matter further should read some of the publications of the Alcuin Club, a learned society which has done its best to stem the tide of "Roman imitation."—*S. L. J., 1933, p. 38.*

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*Pleadings by Counsel.*—One of the rulings set out in the annual report of the Bar Council declares that a barrister instructed to draw pleadings should not delegate his responsibility to another. This is no new thing, for as long ago as 1672 in "The Practice Unfolded," a work relating to the Court of Chancery, we read: "No councillor ought to put his hand to any bill or other pleading unless it be drawn or at least perused by himself in the paper draught before it be engrossed." It goes on to say that pleadings should not be "stuffed with repetition of deeds, writings or records in *haec verba*" but should be brief without "tautoligies, multiplications of words or other impertinencies occasioning needless prolixity."—*S. L. J., 1933, p. 45.*

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*Mr. Glasworthy and the Law.*—It is generally known that Mr. John Glasworthy, O.M., whose death on Tuesday last, at the comparatively early age of sixty-five, is universally regretted, was a member of the Bar; and although he never, we believe, attempted to acquire a practice, his works, both dramatic and literary, afford

abundant evidence of their author's legal training and knowledge, and of the fact that he was able to, and did, appreciate the legal bent of mind. Trial scenes are not uncommon in plays, and legal matters are constantly treated of in novels; but it is very seldom that a member of the profession who sees such a play or reads such a novel, does not at once find some obvious error which for him spoils, to some extent, at any rate, the effect. There were no errors of this sort in any of Glasworthy's works; one may, perhaps, say that the sentence inflicted at the close of the trial in *Justice* was not the sort of sentence which would be likely to be passed in these more merciful days; but the proceedings are all technically correct. And if it be observed that, in the scene in the solicitor's office in *Loyalties,* the junior partner is rather more deferential to the head of the firm than junior partners generally are, that is rather a criticism of present-day manners than of the dramatist. By general consent, the greatest achievement of a most distinguished carreer was The *Forsyte Saga,* and the profession will remember that its chief figure, Soames Forsyte, was a solicitor; a carefully drawn, not very sympathetic, yet always in understandable and typical portrait.—*L.J., 1933, p. 74.*

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*India and the J. C.*—One can understand why the people of India, or one or more of the tribes thereof, still regard the Judicial Committee of the Privy Council as a kind of unknown god from whom justice may be expected to come with reasonable hopes of fulfilment. Hard things are spoken of the Judicial Committee here and there and elsewhere in the British Commonwealth of Nations; but in India, generally speaking, no. From that country cometh the praise; and thence come most of the appeals which are still made to the Board in Downing Street.

That the J.C., deserves its Indian reputation may be judged from a perusal of the "judgment" of the Board, delivered a few days ago by Lord Atkin, in the appeal of a doctor and a police officer from the conviction and sentence by the High Court of Justice at Patna on June 4, 1930, that Court consisting of the Chief Justice and two puisnes. One may be hold in Lord Atkin's speech how on occasion the Judicial Committee can dispense justice for justice's sake, without regard of persons, politics or expediency. Dr. Prasad and Mr. Varma were set free, their honour completely vindicated; and both were declared to be the victims of a serious miscarriage of justice. Yet one observed a seeming tardiness: Conviction and sentence, June 4, 1930; the P. C. judgment, January 26, 1933.—*L. J., 1933, p. 81.*

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*Successive Interests in Chattels.*—Formerly a gift by will of chattels for successive interests conferred an absolute interest on the first limited owner, such as a tenant for life. Now, however, with regard to chattels which are not consumed by use of them, successive interests may be created by will so as to confer enforceable legal rights on the second and subsequent donees: (Halsbury's "Laws of England," vol. 28, p. 527). The case of *Re Swan*; *Witham* v. *Swan* (113 L.T. Rep. 42; (1915) 1 Ch. 829) is an interesting and instructive one on this subject. There, where a testatrix bequeathed certain chattels, including jewellery, to her daughter, with remainder, in the event which happened of the daughter dying childless, to the testatrix's son, and appointed the son and daughter executor and executrix of her will, and on her death in 1895 the daughter took possession of the chattels, but broke up and lost some of them before she herself died childless in 1913, and the son claimed compensation out of his sister's estate for the missing chattels, it was held by Mr. Justice Sargant (as he then was) that as possessor of the articles the daughter was in the position of trustee or bailee for the remainderman, and he was, therefore, entitled to recover by way of compensation out of her estate the amount necessary to restore or replace the articles. The suggestion relating to chattels settled by way of legal limitations in "Fearne on Contingent Remainders," 10th edit., Vol. I, p. 414, namely, that on the executor's assent to the possession of the first taker the latter may "be considered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein", was approved and adopted.—*L.T. 1933, p. 86.*

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*Case Law: Is there too much of it.*—A year or two ago, Mr. Justice McCardie, who had been generally credited with a profound love for precedents, seeing that he was accustomed to submit them to an elaborate discussion in his learned judgments, startled the profession by a vigorous protest against what he termed the "tyranny of case law," from whose tenacious grip the modern practitioner can escape, if at all, only if he possessed the genius for "distinguishing" decisions that may not appeal to him as in accordance with good sense. One writer, himself a distinguished member of the profession, has said that "it is matter of admiration how lawyers have in all times admitted any precedents and authorities, as if to save them from the dreaded discussion of principles." There is, however, more to be said in favour of adhering to precedent than is suggested by such an observation, for if a point of law has been solemnly decided, it is surely good sense to follow it, at all events, till a superior tribunal or the

Legislature has declared it to be erroneous. Adhesion to precedent tends to uniformity in the law, and as Mr. Edward Jenks has said in his "Book of English Law," the doctrine of judicial precedent keeps judiciary law from arbitrariness. In a lecture delivered last week at University College by Sir Maurice Sheldon Amos, K C., it would seem that that great jurist would range himself alongside Mr. Justice McCardie, in thinking that case law, like the world, "is too much with us." In his view some kind of consorship on reports is essential, but it may respectfully be asked, who is to enact the role of censor? So long as our judicial machine works as it does, it is inevitable that precedent should be heaped upon precedent, not infrequently of cases which on close examination are found to be merely decisions on the special facts of the particular case; but while we may deplore this unnecessary multiplication of decisions, there is still much to be said in favour of the principle of free trade continuing to obtain in the reporting world.—*S. J. 1933, p. 69.*

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*"Illegal" Profits: Liability to Tax.*—The point decided in *S. Southern (Inspector of Taxes)* v. *A. B.*, reported in *The Times* of 2nd February, is of more general interest than is usually the case with income tax proceedings. Briefly, it was held that profits accruing to an individual and to a company in respect of betting transactions—admitted for the purpose of these proceedings to be illegal—arose in the course of carrying on a "trade" within the scope of the Income Tax Act, 1918, and were accordingly assessable for tax purposes under Sch. D, Case I. The evidence showed that the individual in question employed touts who had street pitches where they received slips and money. Shortly before the race a runner took the slips and money to an office, from which the winnings were afterwards distributed. All fines which A. B. and his employees had incurred in the course of some thirty-five convictions duly put in evidence before the Commissioners had been paid by the former. The locality of the office was constantly changed in order to escape the vigilance of the police. In the course of his judgment Finlay, J. said that the question whether or not the findings of the Special Commissioners—to the effect that the Revenue could not lawfully claim income tax on profits made as the result of the non-enforcement of the criminal law—were right depended simply upon whether, on the facts stated, there were "annual profits or gains arising or accruing to any person dwelling in the United Kingdom from any trade, profession, employment, or vocation." Once that were found, tax was leviable unless the prospective payer could bring himself within some

special exemption made by the Legislature. The principles laid down by Rowlatt, J., in *Mann* v. *Nash* (Inspector of Taxes), (1932) 1 K. B. 752, covered this main issue, and the learned judge in the case now being considered expressed agreement with the view of Rowlatt, J., and a preference therefor to the opinion of the Irish Court in *Hayes* v. *Duggan*, (1929) I. R. 406, which appears to be based on the principle that an Act of Parliament should not be construed so as to involve the State taking a profit on a prohibited act which it ought to have prevented. The basic principles applicable to cases of this nature are best given by the learned Judge, who formulated them in *Mann* v. *Nash*, *supra*. He said: "The revenue authorities, representing the State, are merely looking at an accomplished fact. It is not condoning it, or taking part in it. It merely finds profit made from what appears to be a trade (in this case the provision of automatic machines for use for unlawful gaming), and the revenue laws say that profits made from a trade are to be taxed. Reliance was also placed on the maxim "*nemo allegans turpitudinem suam est audiendus*." I cannot see that the State is alleging its own turpitude in the present case. It is the appellant who is alleging his turpitude. It is also said that the State are coming forward to take a share in the profits of unlawful gaining. That is mere rhetoric. The State is doing nothing of the kind. It is merely taxing the individual with reference to certain facts. It is not a partner or a sharer in the illegality."—*S.J. 1933, p. 69.*

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*Company Pretending to be a Solicitor.*—An unusual prosecution of a limited company under S. 46 of the Solicitors Act, 1932, for wilfully pretending to be solicitors was heard at Bow Street Police Court by Mr. Graham Campbell on 25th January. The defendant company carried on the business of accountants and auditors, and in a letter written by the company to a man who owed money to his tailor there appeared a reference to the tailor as the company's client and also the following sentence: "We shall give you an opportunity to avoid further action provided you accept the enclosed bill and have the same returned to us immediately." The letter was signed on behalf of the company, and the words "Legal Department" were added. The company through its solicitor pleaded guilty, and on its behalf it was stated that the main business of the company was conducted in Scotland, and under Scottish law the phraseology of the letter in question did not constitute any offence. The learned Magistrate fined the company £.10 and ordered it to pay £.10 10s. costs. S. 46 of the Solicitors Act, 1932, provides that "any person, not having in force

a practising certificate, who wilfully pretends to be, or takes or uses any title, addition or description implying that he is qualified or recognised by law as qualified to act as a solicitor, shall be liable on summary conviction to a penalty not exceeding ten pounds for each such offence." It may seem strange that anyone should think it possible for a limited company to sit for The Law Society's examinations and take out a practising certificate, but the words of the section are quite clear, and if there is any implication in a company's "title addition or description" that it is entitled to act as a solicitor, it would seem that an offence has been committed. The question of a limited company's liability to prosecution for criminal offences was dealt with by Mr. Justice Finlay in *R* v. *Cory Bros. & Co., Ltd.* (1927) 1 K.B. 810, where it was held that a limited company cannot be guilty of manslaughter. It seems clear that "acorporation cannot be guilty of treason or of felony" or of perjury or offences against the person—per Lord Denman, C.J., in *Reg* v. *Great North of England Railway Co.*, 9 Q.B. 215. But "a corporation may be indicted for breach of duty imposed upon it by law"—per Patteson, J., in *Reg* v. *Birmingham and Gloucester Railway Co.*, 3 Q.B. 223. It is clear also that a company may be fined—*Pharmaceutical Society* v. *London and Provincial Supply Association* (1880) 5 A.C. 857. A company obviously cannot be sent to prison, although it seems that it may be guilty of crimes for which there are the alternative punishments of imprisonment or a fine. In such a case the Court, of course, imposes a fine.—S.*J. 1933, p. 70.*

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*What Galsworthy Might Have Been.*—It is curious that Mr. John Galsworthy, Barrister-at-Law, should have taken a law degree at Oxford, that he should successfully have performed the prescribed exercises and ritual in legal learning and dining, and gone so far as to have himself published a barrister in Lincoln's Inn at the age of 23: yet never afterwards to have shown any inclination to practise in the profession or uttered one word of regret (so far as is known) by reason of his failure so to do. For it is now declared and admitted on every hand that he would have made a first-rate Judge, the sort of man who would have been quick to see the salient points in a case; one who would probably have been a very sound lawyer; a just Judge, who in criminal causes and matters would have tempered justice with just about the right allowance of mercy. He might, like Maule, J., have delivered a judgment or two which would have made legal reforms inevitable. However, most people, and lawyers not a few, may think

the leading decisions and the Act well lost in the finding of the Forsyte Saga, and especially of Soames.

And there is little doubt that Galsworthy the novelist and playwright is far more famous than Galsworthy J. or L. C. J., or even Galsworthy L. C. could hope to have been. The greatest of Judges do not in life or death receive even in their own country such obituary notice and applause as have been given to Mr. John Galsworthy at home and abroad.—*L. J. 1933, p. 97.*

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*The Judge-Maker.*—Lord Sankey, during his terms of office as Lord Chancellor, has made a few judges, and he will be responsible for the making of a few more; but neither he nor any other Lord Chancellor can compare in this respect with that Lord Halsbury who was first editor of the *Laws of England.* Lord Halsbury was not addicted to reforms. Lord Sankey is that way inclined; but as Judge-maker Lord Halsbury left other L. Cs. standing.

Some time before his last Chancellorship came to an end there were only two occupants of the Bench who did not owe the appointments they were then holding to his selection or recommendation. Wills, J. and Kennedy, J., were the two. By the year 1904 he had made as many as as twenty-eight Judges, and if Law Lords and Lord Justices (for whom the Prime Minister was technically responsible) are included in the list, the total of the Halsbury creations amounted to thirty-two. There is no valid reason why they should not be included, for Prime Ministers, as a rule, are generally guided, often wisely, by the views of the Lord Chancellor, in exercising this right to nominate Law Lords and Lord Justices for His Majesty's approval.—*L. J. 1933, p. 97.*

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*Drugs and Alcohol in Germany.*—The drug problem in Germany, probably owing to its large land frontiers, until recently gave the authorities considerable anxiety. On the 1st of April, 1931, an ordinance was promulgated which imposed very severe restrictions on the use of drugs of addiction. The medical profession co-operated by submitting to provisions which would possibly have been strongly resisted by their colleagues in other countries. A doctor who prescribes more than 0.2 g. of morphia or 2 g. of opium a day for a patient must record every prescription in a morphia book, and substitute preparations must be used whenever possible. Dr. P. Wolff, editor of the *Deutsche medizinische Wochenschrift* and one of the leading experts of the League of Nations in this field, explained recently in a lecture before the Society for the Study of Inebriety that as a result of this ordinance the consumption of morphia had fallen about 20 per cent.

and that of opium by about 30 per cent. Heroin, which plays so large a part in addiction here and in other countries, is hardly used in Germany at all. Similar restrictions on the use of cocaine by the medical profession have resulted in a decrease in its consumption by more than 50 per cent., and the authorities hope to stamp out cocainism altogether. The alcohol problem has been treated in the same determined way: the Licensed Premises Act of July, 1930, had as its object to prevent the sale of alcohol to intoxicated persons and young persons under eighteen, and on sports grounds, and to prohibit the sale of tobacco to children under sixteen. The granting of licences is made dependent on the demand; opening and closing hours are defined, and the sale of spirits may be prohibited at certain times, such as pay-days and election days. The treatment of drunkenness is systematically organised through the whole country, and legislation is shortly to be introduced by which a judge may order an inebriate to undergo withdrawal treatment and supervision.—*S. J. 1933, p. 90.*

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*Millions in the Scales.*—A High Court judge, even working on a reduced salary, must feel the godlike majesty of his office when called on to determine the fate of a £37,000,000 claim as was Luxmoore, J., recently in the Grand Trunk Railway Case. Still, in these upper regions of calculation, a far more spectacular judgment was given in 1855, when Judge Thompson of the High Court of California awarded John Sutter £40,000,000 damages against over 17,000 trespassers on his estates, £5,000,000 against the State Government and £10,000,000 against the Federal Government of the United States. Sutter's vast territories comprised the sites of San Francisco and Sacramento. There he lived in princely state owning great herds of cattle and keeping a private army to overawe the Indians. Then gold was discovered on his land and all his property rights were violated in the ensuing rush. The action which he won took him four years to prepare, but it availed him nothing. The enraged mob ravaged his estates, burnt the San Francisco Court House and tried to lynch Judge Thompson who had to run for his life. After years of futile effort to obtain justice at Washington, Sutter died a pauper outside the Capital.—*S.J. 1933, p. 97.*

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*The Concealment of Names.*—In referring last week to a case relating to income tax on illegal profits, in which the defendant's name had been suppressed, we noticed that no explanation of this suppression had been given; nor, so far as we are aware, has it

yet been given, But, as *The Spectator* pointed out in last Saturday's issue, there is rarely anything to be said for the suppression of names in Court, except in blackmail cases It is of the essence of English justice that trials should be in public, and, except where the Legislature has otherwise directed, that all the proceedings, including the names of the parties, should be open to publication. It was stated by the Attorney-General that an order had been made that the name of the defendant should be kept secret, and the Judge is said to have remarked that the order had not been made by him, but he described it as "an order by which all concerned are bound". We quote the words from the *Spectator*. But who has authority to make such an order? It can hardly be the Inland Revenue Commissioners, though it seems probable that it was they who purported to do so. And if they purported to make such an order, it certainly did not bind the Court. The suppression of the name of a party can only be justified as a part of the procedure of the Court. We should have thought that all this was quite plain. The Court had no jurisdiction to try the case unless the name was disclosed., That, we take it, is self-evident. And only the Judge could direct the name to be suppressed. Either the Attorney-General or the Inland Revenue Commissioners should give an explanation of the matter.—*L.J. 1933, p. 105.*

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*Party Politics and Charity.*—We are perhaps approaching a time when the party system, which has dominated the politics of this country for two or three centuries—and if we go back to the factions of the Red and White Roses, much longer—will have come to an end, and Government will be national in fact as well as in name. When that time comes, a gift for the commemoration of a national statesman, and for education in national principles will, no doubt, be charitable, and will gain the benefits appropriate to that character. It will not be hurt by the Rule against Perpetuities, and it will be exempt from income tax—assuming that in that Augustan Age there will be such a tax. But at present we still live under the party system, and gifts which are for a party and not for the State have not that quality of general benevolence which the law requires in a charity. Hence Mr. Justice Finlay has been constrained to hold in the case of the *Bonar Law Memorial Trust* (*Times*, 28th ult.) that the Trust is not a charity, and is not exempt from tax. True, it supplies education in political and social science. But, in substance, so the Special Commissioners held, and Finlay, J., agrees with them, the Trust commemorates an eminent Conservative leader, and promotes the principles of the

Conservative party; and its educational functions are only subsidiary. Even "patriotic purposes" are not charitable: *Attorney-General* v. *National Provincial and Union Bank of England* (*Re Letley*) (1924, A. C. 262); though a gift "to my country, England", answers the test: *Re Smith* (1932, 1 Ch. 153); which shows how fine is the distinction between what is a charitable gift and what is not.—*L. J. 1933, p. 106.*

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*The Public Trustee on Trusteeship.*—A paper prepared by Sir Oswald Simpkin, the Public Trustee, and read recently at a London meeting of the Incorporated Secretaries Association, contained strong criticisms of private trustees. He emphasised that "the losses caused by honest muddling and incompetence are just as grave as those caused by actual fraud, if not even graver. Many private trustees are apathetic and indolent, if nothing worse." Sir Oswald proceeded to give some interesting statistics explanatory of the growing work of his own department. The annual turnover in respect of capital and income is now about 60,000,000*l*. Last year the only claim against the office was one for 26*l*.! The Department administered 18,500 wills and trusts. The nominal value of the funds under its control is approximately 215,000,000*l*., in addition to landed property, of which much had never been accurately valued, but which might be taken roughly at 50,000,000*l*. It had, at a guess, something like 200,000 beneficiaries, and is distributing something like 10,000,000*l*. a year in income alone. In addition to cases now under administration, the office has administered and completely wound up a further 11,500 cases, making a total of approximately 30,000 wills and trusts, with an aggregate value close upon 340,000,000*l*. "Trusteeship" added Sir Oswald, "is often regarded as a perfunctory task, but trusteeship of that character could not be swept away too soon. It opened the door to all sorts of muddles and mistakes, sometimes even to fraud and robbery, and it lulled beneficiaries nto a sense of security from which there might be a rude awakening."—*L.J. 1933, p. 106.*

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*Scrutton, L. J., Caps It.*—Our legal annals contain several examples of swift litigation in criminal cases; arrest, trial and execution between sunrise and sunset and so forth; but the speed possible in civil cases was not fully appreciated until the revelation of Scrutton, J., a few days ago. His statement, so clear and unequivocal, is not yet universally accepted, not because the incredulous people have any doubt as to the integrity of the Lord Justice, but because they are not sure whether he has the dates right or

whether, maybe, the Monday was in one week and the Tuesday in another. Here is the statement: "The New Procedure has not yet reached the standard of the Commercial Court. In my time we issued a writ on Monday and obtained judgment on Tuesday. I was counsel in the case."

Counsel in the case before the Court of Appeal was understood to indicate, in a boastful sort of way, that his action was begun on July 6, 1932, and that judgment had been given by the New Procedure Judge on July 29—"23 days later," counsel added, so that there should be no misunderstanding as to the pace. But the Lord Justice was not impressed; and why should he, when in his young days he had a case in which the speed was twenty times as fast; and in which, so far as we know, the record-breaking judgment of the Commercial Court was not the subject of an appeal. But it cannot have been usual, even in the speedy and naughty 'nineties, for trial and judgment to follow so swiftly upon the writ.—*L. J., 1933, p. 116.*

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*A Fair and Courteous Judge.*—All members of the profession, barristers and solicitors (and there are many), who have conducted cases before His Honour Judge Harrington, profoundly respect him as a Judge and love him as a man. Their sorrow at the illness which overtook him on the Bench is correspondingly sincere, and they profoundly hope that he may soon be restored to health. He has never spared himself in discharging the onerous duties of County Court Judge, and his illness is largely due to overwork.

It is comparatively easy for a High Court Judge to maintain an attitude of judicial calm and to hear without manifest impatience the arguments, good and bad, which may be addressed to him at length; and to listen with composure to wandering witnesses. For the County Court Judge with a multitude of cases, the facts of which he must often himself elicit, it is not so easy; and that is why, no doubt, some County Court Judges appear to be bad-tempered, irascible and rude. Judge Harrington is one whose character has proved superior to such adverse circumstances; his courtesy is constant; and he not only renders justice to the best of his good ability, but plainly appears to plaintiff and defendant to be doing so.—*L.J., 1933, p. 116.*

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## BOOK REVIEWS.

MALABAR TENANCY ACT WITH A CRITICAL AND ANALYTICAL COMMENTARY, by Mr. T. Govindan Nair, B.A., B.L., Vakil, Chowghat.

The Malabar Tenancy Act is a fairly difficult Act to construe and there is no case-law to assist the practitioner. In the circumstances, light from whatever quarter must be welcome. A not unsuccessful attempt is made in the book with the available materials to make the provisions of the Act intelligible. The Introduction gives the history of the legislation which, as is well known, is a long one. The Appendices give the Statement of Objects and Reasons and the forms. We have no doubt the profession will find the book useful.

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A HANDBOOK OF CRIMINAL PROCEDURE, by Mr. S. Ranganadha Iyer, B.A., B.L., Advocate, Madras. Price Rs. 5.

Mr. Ranganadhaiyar is not a person unfamiliar to the profession. It is no exaggeration to say that his Criminal Procedure Code has become the feature of the Library of every lawyer and every Court in the Presidency. The present is an abridged edition of his book brought up to date for the benefit of apprentices preparing for their examination and practitioners while on their legs and we have no doubt that the book will abundantly serve that purpose. As an introduction Mr. Ranganadhaiyar has printed the lectures he recently delivered to the apprentices. Therein he gives a clear exposition of the history and the provisions of the Act. The selection of cases (which, in the preparation of such books, is the most difficult part of the process) has been very judicious. As a ready referencer, practitioners will find the book very useful and if one may venture on a prediction, students might soon find it an indispensable book.

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*Basiruddin Ahmed*[1].) On the merits of the application we are not satisfied that the discretion vested in the District Judge has been wrongly exercised by him. In these circumstances we dismiss this miscellaneous appeal with costs." The earlier decision of the same High Court in *Sinnaswami Chettiar* v. *Aligi Goundan*[2] was not brought to the notice of their Lordships and the judgment, crisp as it is, leads us to examine the soundness of the Calcutta decision in *Abdul Razak* v. *Basiruddin Ahmed*[1]. In that case the petition for adjudication was dismissed and the insolvent preferred an appeal under S. 46 of the Act of 1907 to the High Court. During the pendency of the appeal some of the insolvent's creditors had taken out execution of their decrees, and one of them had actually applied for the issue of a warrant of arrest. The insolvent thereupon applied to the High Court for *ad interim* protection. The point was whether the High Court had the power as an appellate Court under S. 47 of the Act of 1907 to grant *ad interim* protection. In holding that it had such power, their Lordships observed, "To put the matter in another way, an *ad interim* order made by a Court of Appeal is merely the exercise by it, for a limited time and purpose, of its wider power to make an order of the same description in reversal or modification of the order of the Court of first instance. Now, in the case before us, if the appeal is ultimately successful, the Court will make the order of adjudication which should have been made by the Court of first instance under S. 16 of that Act and the effect of the order will be that the whole of the property of the insolvent will become vested in the Court or in a Receiver, the insolvent if imprisoned, will be released, and no creditor, to whom the insolvent is indebted in respect of any debt provable under the Act will have any separate remedy against his property or person. It is manifest therefore that this Court may, on the principle just explained, make an *ad interim* order affording the petitioner protection against proceedings by any creditor taken for the enforcement of any debt provable under the Act; in other words, the Court in passing such *ad interim* order makes by anticipation as it were for a limited time and purpose the order which it is competent to make at the final hearing of the appeal under S. 46 read with S. 16—by cl. (6) of which section it will relate back to and take effect from the date of the presentation

1. (1910) 14 C. W. N. 586.  2. (1924) 47 M. L. J. 530.

of the petition of insolvency." It is doubtful if this reasoning of their Lordships will apply to a case arising under the present Act V of 1920. In *Jewraj Kharewalla* v. *Lalbhai Kalyanbhai*[1], a case decided under the present Act, the question was left open, although Page, J., observed that even if the Insolvency Court passed an *ad interim* order of protection in the exercise of its inherent powers, His Lordship would not interfere under S. 115 of the Civil Procedure Code, 1908.

The law therefore as regards the point under consideration is, that the Insolvency Court can, in the exercise of its inherent powers, grant *ad interim* protection. This, it is submitted, is not correct in view of the provisions of the present Act. If we examine the point a little closely, it will be seen that the word "protection" occurs only in S. 31 of the Act. S. 23 provides for release from arrest or imprisonment only if the debtor is under actual arrest or imprisonment in execution of a decree for the payment of money. Hence, as observed by Page, J., in *Jewraj Kharewalla* v. *Lalbhai Kalyanbhai*[1], there is no provision in the Act in respect of orders to prevent the arrest of a petitioner pending the hearing of a petition for insolvency. The question therefore is whether S. 5 of the Act of 1920 read with S. 151, Civil Procedure Code, 1908, can be construed to confer on an Insolvency Court the power to grant *ad interim* protection. S. 5 of the Act of 1920 opens with the expression "subject to the provisions of this Act" which obviously means that the powers conferred by that section are not to be exercised in such a way as to be in conflict with the powers conferred by other provisions of the Act. Ss. 23 and 31 no doubt confer certain powers on the Insolvency Court under certain circumstances but as regards the power to grant *ad interim* protection against a threatened arrest before adjudication, the Act is silent. Apparently therefore the decided cases already referred to are obliged to resort to the inherent powers of an ordinary Civil Court provided for in S. 151, Civil Procedure Code, 1908. The Calcutta case, *Abdul Razak* v. *Basiruddin Ahmed*[2], was decided under the Act of 1907, which provided by S. 16 for automatic release of the debtor from liability to arrest or imprisonment in respect of a debt provable under the Act, as soon as the order of adjudication was passed. The other three cases, two of the Madras High Court, and one

1. (1926) 30 C. W. N. 834. 2. (1910) 14 C. W. N 586.

of the Calcutta High Court, decided under the present Act of 1920, do not carry the point further. The learned Judges in *Sinnaswami Chettiar* v. *Aligi Goundan*[1] merely observe that neither the state of affairs contemplated by S. 31 nor by S. 23 of the present Act had arisen in that case, and that therefore there was no necessity to grant protection at that stage. The decision in the later Madras case, *Nallagatti Goundan* v. *Ramana Goundan*[2], merely follows the ruling of the Calcutta High Court in *Abdul Razak* v. *Basiruddin Ahmed*[3], decided under the Act of 1907. The learned Judges in *Jewraj Kharewalla* v. *Lalbhai Kalyanbhai*[4], decided under the present Act, leave the question open, and the earlier Calcutta case, *Abdul Razak* v. *Basiruddin Ahmed*[3], has not even been referred to.

It is doubtful if when construing the powers conferred by a special enactment the inherent powers of an ordinary Civil Court under S. 151, Civil Procedure Code, 1908, can be invoked. Besides nowhere in the Civil Procedure Code, 1908, or even under S. 151 of that Code, has the Court been held to have the power or inherent power to grant protection to a debtor against his arrest after a decree is passed and before execution is taken out. It may be that the ordinary Civil Court can, under S. 151, Civil Procedure Code, 1908, or any other section of the Code, stay the execution of a decree, but that cannot mean that an Insolvency Court constituted under a special enactment has the like power before adjudication unless such power can reasonably be inferred from S. 5 or from the other provisions of the Act. The Legislature in enacting S. 28 of the present Act, which is a reproduction of S. 16 of the old Act of 1907, has omitted the word "person" which occurred in cl. (2) of the old section, and provided under S. 31 for protection against arrest only after adjudication. The automatic protection which under the old Act the insolvent obtained upon adjudication was abolished, and S. 31 made it necessary for him to apply to the Court for protection. The intention of the Legislature is therefore clear that if at all the Insolvency Court has power to grant protection from arrest, it can grant such protection only after adjudication or under the circumstances mentioned in S. 23, unless the question of protection from arrest before adjudication is taken

1. (1924) 47 M L. J. 530.
2. (1924) 47 M. L. J. 783.
3. (1910) 14 C. W. N. 586.
4. (1926) 30 C. W. N. 834.

to be a question "of any nature whatsoever" within the meaning of S. 4 of the present Act.

S. 9, cl. (1) of the English Bankruptcy Act, 1914, confers express powers on the Bankruptcy Court to stay after the presentation of a bankruptcy petition, any action, execution or other legal process against the property or person of the debtor, and hence under the English Bankruptcy Law, the Bankruptcy Court has power to grant protection from arrest before adjudication. There being no corresponding provision in the Provincial Insolvency Act V of 1920, it is too much to infer from S. 5 or any other provision of that Act that the Insolvency Court has any such power. The Presidency Towns Insolvency Act also does not appear to confer any such power on an Insolvency Court, notwithstanding the provisions contained in Ss. 18 and 18-A of that Act. S. 18 of the Presidency Act enables the Insolvency Court to stay *after the making of an order of adjudication* any suit or other proceeding pending against the insolvent. S. 18-A of the said Act merely enables the Court to stay any *insolvency proceeding* pending against the debtor in any other Court subject to its superintendence although power to stay such proceeding can be exercised after the presentation of an insolvency petition and before adjudication.

In this state of the law on the point, either the Legislature should intervene by enacting a provision similar to S. 9, cl. (1) of the English Bankruptcy Act or the question should be set at rest by an authoritative pronouncement preferably of a Full Bench.

M. V. RAMASWAMI IYER, B.A., B.L.,
*Vakil, Tinnevelly.*

## CRITICAL NOTES.

VENKATACHALAM PILLAI *v.* SETHURAM RAO, (1932) 64 M. L. J. 354 (F. B.), KOLATHU AYYAR *v.* RANGA VADHYAR, (1912) I. L. R. 38 Mad. 114: 24 M. L. J. 84 AND AVULA CHARAMUDI *v.* MARRIBOYINA RAGHAVALU, (1915) I. L. R. 39 Mad. 462: 28 M. L. J 471.

*(Application of the Rule against perpetuities to contracts for sale, re-sale, etc.)*

The above question left open by the Full Bench in *Venkatachalam Pillai* v. *Sethuram Rao*[1] would seem to admit of a

1. (1932) 64 M. L. J. 354 (F. B.).

confident answer in the light of two judgments of the Privy Council.

The rule against perpetuities is enacted in S. 14 of the Transfer of Property Act, and in determining whether a particular provision falls within or outside the permitted bounds, it is well settled that regard is to be had to possible contingencies and not to actual events as they turn out. In other words, if the future event on the happening of which the disposition is contingent, is not absolutely sure of happening within the sanctioned period, and if there is the least possibility that the event may not happen within that period, the disposition fails on the ground of remoteness.

Till the 1st of April, 1930, when the Amendment Act XX of 1929 came into force, nothing in the second chapter of the Transfer of Property Act (which includes S. 14) could affect any rule of Hindu Law; that is to say, any rule of Hindu Law which was inconsistent with the provisions of Chapter II was saved by S. 2 as it stood before the amendment; but where the Hindu Law was silent, the provisions of Chapter II were applicable to Hindus.

Does the Hindu Law contain any doctrine of perpetuities? Is the principle of S. 14 of the Transfer of Property Act applicable to contracts of sale by Hindus? The observations thereon by Sir Bhashyam Aiyangar in *Ramasami Pattar* v. *Chinnan Asari*[1] furnish a convenient starting point for discussion. He pointed out that though the doctrine of perpetuities has no place in Hindu Law, the principle underlying it is not foreign to Hindu Law. By reason of the decision in the Tagore case, the power is under the Hindu Law even more restricted than under the English doctrine of perpetuities and the same limitation has been applied by the Privy Council to transferees for consideration (*Chundi Churn Barua* v. *Sidheswari Debi*[2]).

As regards contracts, the decision in *London and South Western Railway Co.* v. *Gomm*[3] rests on the principles that a covenant to convey, though it does not run with the land, binds the land, and creates an equitable interest in the land in favour of the person entitled to call for a conveyance, and that the rule against perpetuities is applicable as much to executory

1. (1901) I. L R 24 Mad. 449 at 467 to 470
2 (1888) L. R. 15 I. A. 149: I.L.R. 16 Cal. 71 (P.C.).
3. (1882) 20 Ch. D. 562.

equitable estates in land as to legal estates. Noticing a possible distinction on the ground that a contract for the sale of land does not under the Indian Law create any interest in the land, Sir Bhashyam Aiyangar went on to observe that there is really no substantial difference between the English and the Indian Law in respect of contracts of sale of immovable property, and it does seem reasonable and in accordance with principles of general jurisprudence that there should be some limit of time beyond which the performance of contracts for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed. "Although S. 14 deals only with transfers, the provisions of that section," he said, "could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property".

The learned Judge considered that it would be revolutionary to follow in this country the decision in *Gomm's case*[1], and yet he foreshadowed the way of revolution. Indeed, the revolution has been accomplished beyond challenge by the decision of the Privy Council in *Maharaj Bahadur Singh* v. *Balchand Choudhury*[2]. The case arose in the mofussil, and related to a contract (of 1872) which was entered into 3½ months before the date on which the Indian Contract Act came into force. The judgment of the Privy Council (which was pronounced in 1920) goes on the implied footing that the Hindu Law on the point is substantially the same as the English Law; in other words, the rule in *Gomm's case*[1] was held applicable to Hindus on general principles of justice, equity and good conscience.

In compromise of a litigation, the proprietor of a hill had agreed with a Society of Jains that if the Society should require a site thereon for the erection of a temple, he and his heirs would grant a site free of cost. The proprietor afterwards alienated the whole hill and the Society, by their representative, sued the alienees for possession of a site defined by boundaries.

The Board observed:

"If the case be regarded in the light of an agreement to grant in the future whatever land might be selected as a site for a temple, as the only

1. (1882) 20 Ch. D. 562.
2. (1920) L. R. 48 I A. 376; 6 Pat. L. J. 163 (P.C.)

interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest *in presenti*, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

Under the Indian Law, a contract of sale (or re-sale or pre-emption) of immovable property does not, of itself, create any interest in, or charge on, such property (S. 54, Transfer of Property Act); and so, the text of S. 14 (Transfer of Property Act), literally interpreted, cannot apply to such a contract not amounting to a transfer. "The law of India knows nothing of the distinction between legal and equitable estates: by that law there can be but one owner" (*Rani Chhatra Kumari Devi* v. *Mohan Bikram Shah*[1]). Even so, the Privy Council have not flinched from applying to Hindus the rule in *Gomm's case*[2] and that was because they considered that the rule was founded upon "the wide basis of equity and good conscience, which have always been pillars of the administration of justice in India" (*Tara Kumari* v. *Chandra Mauleshwar*[3]). The expression "justice, equity and good conscience" (appearing in the Civil Courts Acts of the various provinces) has been interpreted to mean the rules of English Law so far as they are applicable to Indian society and circumstances (*Waghela Rajsanji* v. *Shekh Masludin*[4]). An Englishman would naturally interpret the expression as meaning such rules of English law as he happened to know and considered applicable to the case (Ilbert).

Reference may here be made to S. 32 of the Contract Act which provides that

"Contingent contracts to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened; if the event becomes impossible, such contract becomes void".

and to the enactment in S. 23 that

"The consideration or object of an agreement is unlawful, if it is of such a nature that, if permitted, it would defeat the provisions of any law".

Suppose there is a transfer of property by *X*, a feminist, to take effect (without further formality) so soon as the British Premiership comes to be held by a woman,—the transfer is void on the ground of remoteness; for, the contemplated event is not inherently sure of happening within the period sanc-

1. (1931) L. R. 58 I. A. 279 at 297 : I L R. 10 Pat. 851 at 869, 870 : 61 M L. J 78 at 89 (P. C.)
2. (1882) 20 Ch. D. 562.
3. (1931) L R. 58 I. A. 450 at 455: I L R. 11 Pat. 227 at 233: 62 M. L. J. 60 (P C.).
4. (1887) L. R. 14 I A. 89 at 96 : I L. R. 11 Bom. 551 at 561 (P. C).

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tioned by the law, and there is some possibility of its not happening within 18 (or 21) years of the expiry of all the lives now in being on this globe. That being so, a *contract* by *X*, the feminist, to transfer property so soon as the British Premiership comes to be held by a woman, would, if permitted, defeat the well-established law of perpetuity; and good sense, good logic and good law require that such a contract should be deemed void and refused specific performance even as between the original contracting parties (*Kalachand Mukherji* v. *Jatindra Mohan Banerji*[1]); citing *Maharaj Bahadur Singh* v. *Balchand*[2], *Ramasami Pattar* v. *Chinnan Asari*[3] and *Kolathu Ayyar* v. *Ranga Vadhyar*[4] among other cases; see also *Dinkarrao Ganpatrao* v. *Narayan Vishwanath*[5]; but contra *Aulad Ali* v. *Ali Athar*[6].

Dealing with S. 6 (*a*) of the Transfer of Property Act, the Privy Council have endorsed the Madras view that it would be futile to forbid transfers of expectancies if *contracts* to transfer them are to be enforced as soon as the estate falls into possession; and such contracts have been declared void under S. 23 of the Contract Act, on the ground that, if permitted, they would defeat the provisions of S. 6 (*a*) of the Transfer of Property Act (*Annada Mohan Roy* v. *Gour Mohan Mullick*[7] approving *Sri Jagannada Raju* v. *Sri Rajah Prasad Rao*[8]). That line of reasoning applies to the case now on hand.

The legislative changes in the Hindu Law effected by the Hindu Transfers, Bequests and Disposition of Property Acts of 1914, 1916 and 1921 and the more recent enactment of 1929 by which Chapter II of the Transfer of Property Act supersedes the Hindu Law on all matters covered thereby,—these are striking tokens of India's appreciation of the English doctrine of perpetuities. The rule in *Gomm's case*[9] is a salutary part of that doctrine. In 1920, the Privy Council upheld the rule as good for India; and the High Courts at Bombay and Calcutta have followed that ruling in *Kalachand Mukherji* v. *Jatindra Mohan Banerji*[1] and *Dinkarrao Ganpatrao* v. *Narayan Vishwanath*[5].

K. C. G.

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1. (1928) I. L. R. 56 Cal. 487 at 493 to 505.
2. (1920) L. R. 48 I. A. 376: 6 Pat. L. J. 163 (P. C.).
3. (1901) I. L. R. 24 Mad. 449.
4. (1912) I. L. R. 38 Mad. 114: 24 M. L. J. 84.
5. (1922) I. L. R. 47 Bom. 191 at 204 to 218.
6. (1927) I. L. R. 49 All. 527 (F. B.).
7. (1923) L. R. 50 I. A. 239: I. L. R. 50 Cal. 929: 45 M. L. J. 617 (P. C.).
8. (1915) I. L. R. 39 Mad. 554 at 558 to 560: 28 M. L. J. 650.
9. (1882) 20 Ch. D. 562.

## CORRESPONDENCE.

### SECTION 19, CLAUSE (XIV) OF THE COURT-FEES ACT AND ITS APPLICATION TO BATTA MEMOS FOR SUMMONING WITNESSES IN THE CIVIL COURTS.

Till the advent of the Court-Fee Examiners in the year 1929, to moffusil Courts for inspection, batta memos for summoning witnesses were not treated as applications required to be affixed with Court-fee stamp to the value of twelve annas; since then, every subsequent memo to the first is treated in the nature of a second application, not coming within the exemption provided for under clause (*xiv*) of S. 19 of the Court-Fees Act and Court-fee stamp to the value of twelve annas is insisted on being affixed to the batta memos, evidently under Article 1, Schedule II of the Court-Fees Act. But this practice does not seem to be uniform in all the Civil Courts in the Presidency.

Apart from the fact, namely, that some Courts do not insist on every second batta memo for summoning witnesses being affixed with Court-fee stamps to the value of twelve annas. Uniformly, the variance in different Courts causing perplexity to the clients who have work in two or more Courts, let us examine the provisions of law to see whether the innovation is warranted.

Clause (*xiv*), S. 19 of the Court-Fees Act reads thus: "Nothing contained in this Act shall render the following documents chargeable with any fee—First application (other than a petition containing a criminal charge or information) for the summons of a witness or other person, etc., etc. . . . ". As per Rule 50, sub-rule (1) of the Civil Rules of Practice a party who desires the attendance of any witness shall bring into Court a list of the persons in Form No. 20. In Form No. 20, as found in Vol. II of the Civil Rules of Practice and Circular Orders issued by the High Court of Judicature at Madras for the guidance of Subordinate Civil Courts in the Presidency, 1928 Edition, there is a request to the Court that the summons may be issued. Is the inclusion of the word "request" to be construed as a prayer and is such a list to be construed as an application coming under Article 1 of Schedule II of the Court-Fees Act.

In O. 16, R. 1 of the Civil Procedure Code, 1908, the wording is "the parties may obtain, on application

to the Court or to such officer as it appoints in this behalf, summonses to witnesses". The application is not numbered as any interlocutory application. The Court does not pass any orders on the list of witnesses. Notice is neither ordered nor given to the opposite party, as is required to be given in the case of interlocutory applications. The Court is bound to issue the summons, excepting, in the exercise of its inherent power under S. 151, Civil Procedure Code, to prevent the abuse of its own powers, in extraordinary circumstances, it may refuse to issue the summons. The said refusal cannot be appealed on, independently of any appeal, that may be made on the Court's decision in the subject-matter of the suit or proceeding. The reasoning, that because the word employed in the Civil Procedure Code is an "application" cannot therefore warrant the levy of Court-fee of twelve annas in some Courts for every subsequent list of witnesses.

The construction that is put upon the words "application," "list" and "memo" in this connection is not the same by the ministerial officers of different Courts. The Court-Fee Examiners remark that every second or subsequent list of witnesses should be treated as not coming under the exemption provided for under clause (*xiv*) of S. 19 of the Court-Fees Act and cannot be allowed to be understood differently for different Courts. There must be uniformity in observance.

Before an original suit in a moffusil Munsif's Court reaches the stage of trial, the parties have to apply for summons to witnesses at least half a dozen times. The life of an original suit in such Courts may without fear of contradiction be taken as extending for one year. It would, therefore, be throwing additional burden on the already impoverished litigants if every time he applies for summons for witnesses he is compelled to pay application fee of twelve annas.

It is therefore necessary that there should be a finality in the matter and the practice in vogue prior to the advent of the Court-Fee Examiners in not treating the list as an application requiring Court-fee should be restored.

N. S. GURUSWAMI,
*Pleader, Koilpatti.*

## SUMMARY OF ENGLISH CASES.

THOMAS *v.* OCEAN COAL COMPANY, LIMITED, (1933) A. C. 100.

*Workmen's compensation—Injury from accident—Breach of statutory regulation—Accident if "arising out of and in the course of" employment—Meaning of.*

A hitcher whose work was to be in charge of the pit bottom, attend to the winding signals, close and open the gates, and help so far as necessary in getting full trams and empty trams into and out of the cages, crossed the pit bottom to see to the proper working of empties towards the main road and dashed back to cross under the descending cage towards his proper working side in order to be ready to receive that cage when it landed; but while crossing the pit, the cage descended on him and killed him. Though passing from one side to the other was one of the things he was engaged to do, it was in contravention of statutory regulation to pass across the pit bottom when the cages were working. The act of the workman was for the purposes of the employer's business. The widow claimed under the Act for compensation but the Court of Appeal and County Court Judge dismissed the claim holding that by acting contrary to the regulation, he added a serious peril and that placed him out of the scope of the employment.

*Held*, (by the House of Lords) that notwithstanding the fact that the workman was acting in contravention of the statute when the accident happened, yet the injury must be deemed to have arisen out of and in the course of his employment under S 1, Sub-S. (2) of the Workmen's Compensation Act, 1925. The proper course is to ascertain if, disregarding the prohibition, the injury was due to an accident arising out of and in the course of the employment. The question is if at the time of the accident the workman had stepped outside the sphere of his employment or whether he was still within that sphere, although acting in contravention of a statutory and employer's prohibition.

*Garrallan Coal Co.* v. *Devlin*, (1927) A. C. 59 and *Wilsons and Clyde Coal Co.* v. *M'Ferrin*, (1926) A. C. 377, followed.

*Stephen* v. *Cooper*, (1929) A. C. 570, distinguished.

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WESTMINSTER BANK, LIMITED *v.* OSLER (INSPECTOR OF TAXES), (1933) A. C. 139.

*Income-tax—Bank—Conversion of War Bonds to Conversion Loan and War Loan—Profits by such conversion—If taxable.*

The Bank held large investments in National War Bonds of various issues. The Government offered to exchange those bonds

into 3½ per cent. Conversion Loan stock at the rate of 134*l*. for each 100*l*. nominal value of National War Bonds or into 5 per cent. War Loan, 1929-47. The Bank exchanged its National War Bonds some into Conversion Loan and some into War Loan and increased the value of its investments. The question was whether in arriving at the profits for income-tax assessment, the increased value should be taken into consideration.

*Held*, that the exchange effected in the circumstances was the exact equivalent of what would have taken place had instructions been given to sell the original stock and invest the proceeds in the new security. The investment represented by the original War Bonds came to an end as soon as the new securities were taken in its place, when a new venture was begun in relation to the new holding. There has been a realisation of the security. This is not equivalent to mere exchange of an item in the stock in trade of a trader. The profit was therefore assessable to income-tax.

*Royal Insurance Co.* v. *Stephen*, (1928) 14 Tax Cas. 22, approved.

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*In re* WILLIAM METCALFE AND SONS, LIMITED, (1933) 1 Ch. 142.

*Company—Voluntary liquidation of—Preference and ordinary shares—Surplus assets after payment of all liabilities inclusive of paid-up capital to shareholders—Preference shareholders if entitled to share therein* pari passu *with ordinary shareholders.*

A company registered in 1897 carried on business with a capital of 24,000*l*. divided into 2,400 10*l*. shares, of which 1,000 were preference and 1,400 were ordinary shares. In 1928 it sold the business and resolved to be wound up voluntarily. The dividend on preference shares had been paid down to date, but no dividend was paid since 1918 on ordinary shares. After payment of debenture debt and other debts of the company, the paid-up capital was also paid off. There remained a surplus available for payment to shareholders; the bulk of which was attributable to accumulated profits. By clauses 5 and 12 of the articles, the preference shareholders were entitled to a fixed cumulative dividend of 5*l*. per cent. per annum upon the capital paid up thereon and the return of their capital in priority to the ordinary shareholders.

*Held*, that nevertheless the preference shareholders were also entitled to share equally with the ordinary shareholders in the surplus. Preference shareholders are members of the company and as much shareholders in it as the ordinary shareholders are, and they must be treated as having all the rights of shareholders except so far as they have renounced those rights on their admission to

the company. Mere priority advantages cannot be taken as an implied renunciation by them of their other rights

Per *Romer, L.J.*—" Supposing that you find the statement in the memorandum and articles of a company that the preference shares shall confer a right to a preferential fixed dividend of so much per cent. during the first five years of the company's existence, and nothing more is said about the rights of the preference shareholders to dividend, it would be impossible in my opinion to argue that as from the expiration of those five years the preference shares did not rank in respect of dividend *pari passu* with the ordinary shares."

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BRADSTREETS BRITISH, LTD *v.* HAROLD MITCHELL AND CARAPANAYOTI & CO., LTD., (1933) 1 Ch. 190.

*Contract—Mercantile Inquiry Agency—Confidential reports to subscribers—Condition to keep report secret—Indemnity for damages by disclosure—Action for libel—Agency made liable—Claim against the subscriber on indemnity—Liability of—Clause if valid.*

The plaintiff company was carrying on the business of a mercantile inquiry agency, the course of the business being to furnish reports to subscribers on the financial position of companies, firms or persons engaged in trade. It was a condition that the subscribers should keep the report secret and only for his exclusive use and the subscriber indemnified the company in respect of any loss or damage it may suffer from the breach of the condition by the subscriber or his employees. The defendant company became a subscriber and enquired about the reputation of X & Co., whose agents the defendants were. The report was unfavourable. This report *C*, the managing director, communicated to *M*, a co-director. *M* in his private capacity applied to be made and became a subscriber of the plaintiff company, on the false representation that he had a private business of his own. *M* in that capacity then applied for information about X & Co. The plaintiff gave the same report, which *M* communicated to *C*. *C* then as X & Co.'s representative instructed *X's* solicitors. X & Co. thereupon issued a notice to the plaintiff, who wrote to the defendant company and *M* withdrawing the report and asking for its return. *X* sued plaintiff for libel and recovered damages. The plaintiff thereupon sued the defendant company and *M* for damages and on the indemnity clause.

*Held*, that the defendant company did not disclose the report to any person other than its solicitors for advice, that *M* and *C* individually joined together to make *M* a subscriber, get the report and disclose it to *X*, that they were not thereby acting as

defendant's agents, that defendant company was not therefore liable for breach of contract. *M* is liable for the breach. The agreement to indemnity was not void as opposed to public policy. It is not a contract to indemnify against the result of a libel published by *M*, but one by *M* not to disclose information, with a provision for indemnity in respect of damage or loss which may be incurred from the breach of the contract by *M* not to disclose.

*Weld-Blundell* v. *Stephens*, (1920) A. C. 956, discussed and followed.

*M* cannot be made liable for the damages given in the libel actions, for that damage did not arise directly or indirectly out of any act of *M* but *M* is liable for damages resulting from his own breach of contract.

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*In re* SCIENTIFIC POULTRY BREEDERS ASSOCIATION, LIMITED, (1933) 1 Ch. 227.

***Companies Act, 1929—Ss. 4 and 5—Company—Limited by Guarantee—Objects encouraging and improving scientific methods of breeding etc. poultry—Memorandum of Association—Prohibition against remuneration to Governing Body members—Increase of business—Special resolution granting remuneration—Application to sanction the resolution—If Court can sanction the alteration of the Memorandum.***

An association was registered under the 1908-17 Companies Act as a company limited by guarantee with the object of improving breeds of poultry and promoting more scientific methods in feeding, housing and breeding poultry. The memorandnm of association prohibited the payment of any remuneration or the division of any profits among the members of the Governing Body. The business and membership of the association so greatly increased in course of time that the Governing Body found that they were unable to bestow sufficient time unless they were paid for it. A special resolution of the General Body meeting was passed altering the memorandum by permitting remuneration to the members of the Governing Body to a certain extent. An application was then taken out by the association under S. 5 to sanction the alteration.

*Held*, by the Court of Appeal (reversing Eve, J.) that it having been found that the alterations are desirable and put forward by the company in good faith, and that they are desirable for more efficiently carrying on the main objects of the company which are left unaltered, the alterations came within the scope of S. 5. Sub-s. (1), even though they do alter the character of the company in this sense, that for the first time the members will be entitled to receive remuneration or a share of profits. It is only if the alteration is of such a character as substantially to alter the main object

for which the company was formed, that the Court ought not to sanction it.

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*In re* JACKSON. BEATTIE *v.* MURPHY, (1933) 1 Ch. 237.

*Will—Ambiguity in—Two legitimate and one illegitimate nephew of the same name—Bequest to " my nephew A. M."—Evidence if admissible to identify the nephew.*

A testatrix *J.* by her will devised and bequeathed the residue of her estate after payment of legacies, debts, etc., to " my brothers . . . . . my sisters. . . . . . and my nephew Arthur Murphy in equal shares".

At her death it was found that the testatrix had three persons who apparently answered the description " my nephew *A. M.*". Two of them were legitimate sons of two of her brothers and the third was an illegitimate son of a sister. One of the nephews was resident in Australia for 17 years and had visited the testatrix during his visits to England. His father was not on good terms with the testatrix. The other nephew was living in England and known to the testatrix but his father had a share under the will and as he died during *J.'s* lifetime, the nephew was entitled to that share. The illegitimate nephew had married a niece of *J.* and the testatrix used to call him her nephew and was called " aunt " by him. During the latter part of her life, he had managed her financial affairs and in a previous will *J.* had described him as "my nephew *A M.*, son of my sister *M. M.*".

*Held*, that the illegitimate nephew took in the circumstances. If there had been one legitimate nephew only named *A. M.* that nephew would undoubtedly have taken the legacy, and no evidence at all as to the existence of the illegitimate nephew would have been admissible. But as soon as it appeared from the evidence that there is more than one nephew of that description, the Court is entitled to have evidence of the state of the family generally, and to be put to some extent in the position of the testatrix in order to ascertain not what she intended but what the words which she has used were intended to mean.

In re *Fish*, (1894) 2 Ch. 83, distinguished as a case where there was only one legitimate claimant and consequently no ambiguity.

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*In re* WILLIAMS. WILLIAMS *v.* PAROCHIAL CHURCH COUNCIL OF THE PARISH OF ALL SOULS, HASTINGS, (1933) 1 Ch. 244.

*Will—Construction—Gift to husband absolutely "knowing that he is fully aware of my intention"—Discussion of will before*

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*husband—Silence of husband—Husband aware of her intentions—If intentions enforceable.*

Mrs. *W* made a will in the following terms: "I give and bequeath everything ..... to my dearly loved husband *G. A. W.* absolutely, knowing that he is fully aware of my intention that at his death all my possessions are to be sold and given to All Souls Church, Clive Vale, Hastings ..... I am aware of my husband's intention to bestow his possessions at his death on the same All Souls Church .... ." The will was in her own hand. It was read out by her solicitor in the presence of her husband. She referred to the intention expressed in her will and discussed its contents with her solicitor. The husband was present at the whole of the interview and heard what took place. The husband did not object to it. The wife predeceased her husband and the husband later died intestate. The question arose if the will conveyed the property to the Church or went to husband's next of kin on his death.

*Held*, that the husband knew that his wife's desire was that at his death her property should go in the particular way which she indicated; and by his silence he must be taken to have agreed, not merely to be bound by the terms of the wife's will, or to give effect to the dispositions of it, but must be taken to have agreed to carry out his wife's wishes. The husband therefore took the property burdened with that obligation and it is an obligation which the Court will enforce, by declaring that the property of the wife to which the husband was entitled under the will belongs to the Parochial Council in question.

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*In re* HANLON. HEADS *v.* HANLON, (1933) 1 Ch. 254.

*Will—Construction — Proviso for defeasance of vested interest in a certain event, namely, marriage or association with a specific named person—Validity of.*

By his will, a testator bequeathed certain property to his widow during her life or widowhood, and on her decease or re-marriage to his children, a son and a daughter in equal shares but subject to the proviso, namely, that if the daughter should intermarry with a certain person *A B* (named in the will) or should live with him as his wife, although not married to him, or should misconduct herself with him in any manner, or should leave home with the intention of living with him, or should be delivered of a child or children of whom the said *A B* should be the father, then in any of those events, the bequest in her favour should be absolutely forfeited and void. There was no gift over in the event of the condition above referred to taking effect. The question was raised if the defeasance clause was effective or purely *in terrorem* or void either for uncertainty or otherwise.

*Held,* the conditions were not void for uncertainty, nor are they *in terrorem*. The fact that there is no gift over does not make it *in terrorem*; for there is here a clear desire of the testator to revoke the gift in those events.

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*In re* WILLIAM C. LEITCH BROTHERS, LTD. (No. 2), (1933) 1 Ch. 261.

*Company—Winding up—Fraudulent carrying on of business by director—Declaration of Court to that effect—Recovery of moneys from director—How distributable—Companies Act, 1929.*

In the winding up of a company, the Court found as a fact that from March 1, 1930, the company was carrying on business with intent to defraud the creditors, and that it was so carrying on business to the knowledge and under the direction of a director. The Court thereupon made an order under S. 275, Companies Act, 1929, that the said director was personally liable to the extent of 6000*l*. The liquidator recovered from the director 3356*l*. on account of the 6000*l*. and asked for directions from Court as to how he ought to deal with the amount, whether they formed part of the general assets of the company available for all the creditors or distributable only to those creditors with whom debts were contracted during the period when the business was being carried on with intent to defraud.

*Held,* that though the liability is measured by the debts of the defrauded creditors, yet it was not by itself a ground for holding that the ordinary rules of *pari passu* distribution of assets should be departed from and a preference created in favour of the defrauded class. The amount should be dealt with by the applicant as general assets.

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CRUSE *v.* MOUNT, (1933) 1 Ch. 278.

*Landlord and Tenant—Lease of an unfurnished flat—No warranty of fitness for habitation.*

In regard to an unfurnished flat there is no warranty or implied condition as in furnished houses that the flat is reasonably fit for occupation. Were the matter *res integra,* the case of a flat may be treated as of a special character but *Manchester Bonded Warehouse Co.* v. *Carr,* 5 C. P. D. 507, was an authority against it.

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ISRAELSON *v.* DAWSON (PORT OF MANCHESTER INSURANCE COMPANY, LIMITED, GARNISHEES), (1933) 1 K. B. 301.

*Practice—Procedure—Garnishee order—If can be made when debt disputed—Motor car insurance—Third party risks—Decree against assured for accident by him—If judgment-creditor can*

*attach the claim under the policy—Such claim if a debt due to the assured.*

The plaintiff was knocked down and injured by a motor car in the possession of the defendant. The defendant was insured under a policy whereby the insurance company had agreed to "indemnify the insured . . . as regards all sums for which the insured . . . shall become legally liable to pay in respect of . . . . . accidental bodily injury to any person. . . ." The plaintiff obtained a judgment for 150*l*. as damages for his injuries and proposed to garnish the claim under the insurance policy as a debt due to the defendant.

*Held*, that in order to found jurisdiction to make any order for attachment or for the trial of an issue as to the debt, the applicant must first establish that there is in law a debt due from the garnishee to the judgment-debtor. As between the assured and the underwriter there is no debt. There may be a breach of contract or an obligation to indemnify him against such payment as he may have to make but that is not a debt which can be attached.

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KOCH *v*. DICKS, (1933) 1 K. B. 307.

*Bill of Exchange—Alteration of place where the bill was drawn from London to Germany—Result to make it a foreign bill—Alteration without acceptor's consent—If a material alteration avoiding the bill.*

*D*, an English merchant, bought some wireless apparatus from a Radio Co. in Germany and, for the price of these, accepted certain Bills of Exchange drawn in London. The bills were endorsed by the Radio Co. to *K*. who had financed that Company. As the German Bank refused to discount the bills unless they were drawn in Germany, the place of drawing was altered by the drawer himself from London to Deisslingen and thereby the bill became a foreign bill.

*Held*, that as the alteration of an inland bill to a foreign bill alters to some extent the rights and obligations of the parties to the bill, the alteration after the bill was complete was a material alteration and as it was effected without the assent of the acceptor, the acceptor was discharged under S. 64, Bills of Exchange Act. It is immaterial whether the alteration of the bill makes it more or less favourable to the holder who seeks to enforce the obligations, if in fact it alters the legal incidence of the bills.

*Foster* v. *Driscoll*, (1929) 1 K. B. 470, distinguished as a case where the alteration of the place was made while the bill was an incomplete instrument, a purported English bill on unstamped paper, with no time for payment filled in.

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BUCKLAND *v.* THE KING, (1933) 1 K. B. 329.

*Petition of Right—Detinue by Crown's servants—Petition if lies—Packet of cinematograph films—If a "baggage of passengers" within S. 66, Customs Consolidation Act, 1876.*

The suppliant who was a producer of operatic films produced in Berlin films of six operas, packed the films in six separate parcels, each in a cardboard box, and registered them through from Berlin to Victoria Station, London. The suppliant travelled by the train by which the parcels were sent. On landing at Victoria the Customs officers detained the parcels and informed the suppliant that they were liable to duty and as they were not duly entered, they would be forfeited unless the duty was paid. After some years of correspondence, the suppliant (addressee of the parcels) launched a petition of right, claiming the return of the films or their value and damages for detention.

*Held,* that the detention was lawful, as the parcels were not "baggage of passengers" within the meaning of S. 66 of the Customs Consolidation Act, 1876 and therefore liable to duty.

A petition of right lies against the Crown in respect of goods *wrongfully* detained by its servants. It would be a grave state of affairs if a subject were destitute of remedy where the servants of the Crown wrongfully detained his goods.

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VANBERGEN *v.* ST. EDMUNDS PROPERTIES, LTD., (1933) 1 K.B. 345.

*Contract—Debt—Agreement to pay the debt to solicitor's account in bank—Payment into bank likewise—If valid agreement —Debt if discharged by such payment.*

The plaintiff, a trader, was indebted to the defendants in the sum of 208*l.* for costs under judgments and he entered into an agreement with the defendants' solicitors by which they agreed that if the plaintiff would pay the amount of the debt in cash into a bank at Eastbourne for the credit of the solicitors in London, that payment would satisfy all sums which the plaintiffs owed them. The plaintiffs so paid the amount but nevertheless the defendant issued a bankruptcy notice to be served on the plaintiff. In an action by the plaintiff for damages,

*Held,* that the payment into the bank discharged the debtor. The agreement so to accept it was not *nudum pactum* and the debt having been so discharged, the bankruptcy notice was unjustified and the defendants were liable to damages to the plaintiff which must be reasonable and temperate.

## JOTTINGS AND CUTTINGS.

*China, Japan, and the Covenant.*—The Covenant of the League of Nations was, according to its preamble, made "in order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war"; and it provides for the steps to be taken in the case of a dispute between Members of the League "likely to lead to a rupture." This is Art. 15, and the steps prescribed by that Article are now being taken at Geneva, though the authors of the Covenant could hardly have anticipated that one of the disputants would—as Japan now—be at the same time enforcing its claims by arms. The earlier paragraphs of the Article provide for a Report by the Council on the dispute; but under a later paragraph, the Assembly may be substituted for the Council, and that course has been adopted. The Assembly have, with practical unanimity, adopted their Committee's Report on the occupation of Manchuria by Japan, and that Report is adverse to Japan. Then "any member of the League represented on the Council may make public a statement of the facts of the dispute, and of its conclusions regarding the same." This step also has been taken, and Japan has made a statement on her own behalf: "The Assembly stands, if it may be so said, for mere formulæ—Japan for solid realities." And so, the pleadings being closed—China has already entrusted her case to the League—and one party having already taken the issue into its own hands, it remains to be seen what resources remain at Geneva. Meanwhile, Great Britain has given a lead to the rest of the world by placing an embargo on the export of arms to the East, though this is defective in that it saves existing contracts; and that it applies to China as well as Japan, and thus confounds the innocent with the guilty. It can only be justified on the ground of prudence.—*L. J., 1933, p. 141.*

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*So many Silks.*—The last batch of silks (not excluding the supplementary list) has increased the number of K. C.'s once more to the number of more than 300. The list includes the names of County Court Judges and magistrates who in earlier days were called within the Bar; but allowing for these and other successful men, including those who, like Sir Harold Morris, Mr. Wingate-Saul and others, hold quasi-judicial and other offices of profit under the Crown, there remain a formidable crowd of silks who are plying, more or less successfully, for hire.

Suppose for the moment (and only for the moment) that there are thirty Judges continually functioning during the working days of the year and 250 K. C.'s always available for work in

Courts in which a silk might with propriety appear in his capacity as leader. If silks were engaged in Court as fully as these Judges, it would appear that of the 250, seventeen silks only (or thereabouts) would be required, allowing two for each of the Judges aforesaid. It looks bad for the majority; especially when one observes that there are silks who appear simultaneously in two or more cases in different Courts; and that the number of cases in which no silk is briefed, and when juniors are left to carry on the fight single-handed, is lamentably large. On the other hand, we know that silks do much good work in chambers; that none is continuously employed in Court; and that the remuneration earned by those who are only engaged on a casual or part-time basis is sufficient to meet their more urgent needs.—*L. J., 1933, p. 149.*

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*Concerning Ceremonial and other Matters.*—For many years now the number of K. C.'s has remained more or less constant, not varying much above or below the total of 300. Compare this with the total of 14 K. C.'s in the second half of the eighteenth century, of 28 in 1850. Fifty years ago the number was 200, and in the early part of the present century the number had increased to 270.

In the main the latest silks are men whose practice and professional standing at the Bar marked them out for such promotion; but, as in almost every previous case, the mode of granting and withholding of patents is not wholly understood. Why, it is asked, should Robinson, who has enjoyed a large practice for many years, be denied that which is granted to Jones, who never had one?

And might not the ceremonial business be simplified or otherwise improved? Instead of this marching round to every occupied Court, and then being invited, individually, to " move," might there not be a single ceremonial in the Court of the L. C. J., with all the puisnes present and correct? It would be much more impressive. The weary pilgrimage from Court to Court is not impressive, and is a nuisance to all concerned.

And again: Why not abolish the custom of informing all one's seniors of the Circuit Mess that it is one's intention to apply to the Lord Chancellor for silk? The evils resulting from this custom have been enumerated time and again; while its advantages (if any) are far to seek.—*L. J., 1933, p. 149.*

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*How to Slander Lawyers and Clergymen.*—Many years ago there appeared in *Scribner's Magazine* an article (written by a lawyer) entitled " Some Precepts for Slandering Safely "; wherein the following passages appear, Holt and Yelverton being cited as the authorities. To follow them implicitly might be dangerous now.

"You can call a clergyman a dunce, a blockhead, a fool, for it does not injure him in his profession. The Court held that one can be a good parson and a great fool; but otherwise of an attorney. It has been adjudged that to call a justice of the peace blockhead, ass, etc., is not a slander for which an action will lie, because—note the distinction—he was not accused of any corruption in his employment, or any ill-design or principle; 'And it was not his fault,' said the Court, 'that he was a blockhead, ass, etc.; for he cannot be otherwise than his Maker made him; but, if he had been a wise man, and wicked principles were charged upon him when he had them not, an action would have lain; for though a man cannot be wiser, he may be honester than he is.'

"You can say of a lawyer, 'He has as much law as a monkey,' because he hath as much, and more also. But if you say, 'He hath no more law than a goose,' then are these words actionable. You can say, 'He is a common barrator and deserves to be hanged,' for the words 'He deserves to be hanged' are too general and extravagant to found an action on; because it was not shown what action was done to deserve hanging. The words 'Honest lawyer,' spoken ironically of an attorney, were held actionable."—*L. J., 1933, p. 155.*

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*Libel and Innuendo.*—As stated, it would be unwise to assume that the law of defamation stands exactly where it did. Irony is still a most dangerous ingredient in any statement of dubious intent. Take, for example, the action brought by Thomas Casement against the *Daily Express* in the High Court at Dublin last week. The statements, or some of them, alleged to be defamatory were, if made and intended literally, not obviously libellous. "Tom Casement leaned on the polished marble top of a Dublin bar and critically examined his hat. Tom Casement is well-known throughout the Free State. He is the brother of Sir Roger Casement, executed for his part in the Irish Rebellion of 1916, when Tom was serving with the British Forces in South Africa. He is a good mixer and a true democrat." Of his hat it was written: "A wonderful hat, battered, weather-beaten and grey-green with age. Once I was chatting to Tom when the hat was whisked off his head and sent below on the hotel kitchen lift."

Geoghegan, K. C., for the plaintiff, said the words meant and were understood to mean that the plaintiff, a very distinguished Irishman, was drunken, dissolute and debauched, incapable of managing himself or his affairs, that if the words were true they would make the plaintiff appear, to the injury of his credit and reputation, "an utter buffoon, and a mere stage Irishman." This was denied by Fitzgerald, K. C., for the defendants. But the present

position is that Hanna, J., has entered judgment for the plaintiff for 500*l*. damages and costs, and refused a stay of execution pending appeal.—*L. J.. 1933, p. 155.*

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*Silks' Former Privileges.*—Down to the reign of William IV., those appointed King's Counsel enjoyed certain privileges, or rather received certain perquisites, owing to the fact that they were then considered in a more real sense than is now the case, counsel of His Majesty, although the title still rather indicates that they are in the service of the King. Each silk in the old days received a salary of £40 and with this amount he also received a number of brief bags which he distributed among his junior friends who had shown themselves professionally worthy of this honour, for honour it was considered, as at that time a junior barrister was by the etiquette of the profession precluded from carrying a bag until he had been given one by a silk. In addition to receiving a salary, such as it was, and a supply of brief bags, the King's Counsel had likewise an annual allowance of stationery and quill pens, so that on the whole he did pretty well. Then came the period of reform, not only in that which concerned the representation of the people, but reform in the matter of national expenditure, and in the wave of economic retrenchment the various allowances and perquisites to which the possessors of silk gowns and others were entitled, were now swept away. Thereafter, a King's Counsel had to provide himself and at his own costs and charges with his stationery and quill pens, and there resulted also as a consequence the new practice of the junior Bar providing themselves with their brief bags in which to stow their papers. So much for the privileges formerly enjoyed by silks.—*L T., 1933, p. 171.*

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*Their Obligations.*—What were some of these? First, as being counsel for the King, they could not, without a licence, appear against the Crown, and although this licence was granted as a matter of course it involved a small payment which in due time figured in the bill of costs with which the client was faced at the conclusion of the litigation. That particular obligation has now been dispensed with. Another obligation from which present-day silks are exempted, but by which their predecessors were bound, was the obligation of obtaining a certificate that they had taken the sacrament. Lord Campbell tells us that he well remembered the time when barristers, who had not been to church for many years, on being appointed King's Counsel used to go to St. Martin's Church, pay their guinea, and bring away the certificate of having taken the sacrament according to the rites and ceremonies of the Church of England. Not only on being appointed

silks had members of the Bar to comply with this requirement; all who obtained any judicial appointment were compelled to qualify in the same way. Serjeant Robinson tells us in his reminiscences that one of the veteran Old Bailey practitioners of his youth— Curwood by name (the same who was sued under the pseudonym of "Benedict" in the well-known cases of *Montagu* v. *Benedict* and *Seaton* v. *Benedict* for debts contracted by his wife, regarding whom he once confided to a brother practitioner that "if you were to rake the infernal regions with a small tooth comb, you would not find a woman with a tongue and temper as Mrs. Curwood")—was appointed a Commissioner of Bankruptcy, and as such he was required to take the sacrament within six months under certain pains and penalties. Curwood was not given to church-going, and so put off the ceremony as long as possible. One day, however, when passing a church and seeing several persons going in, he bethought him of getting his certificate. He went in, sat down in a pew, and without paying the least attention to what was going on, took out some papers and began to read them. When the service was over he went into the vestry and asked the clerk for a certificate. "A certificate for what, sir?" asked the clerk. "Well," answered Curwood, "I don't know much about it, but I have lately obtained an appointment, and I understand it is necessary I should get a certificate that I have attended—well, I believe, it is the sacrament" "Sacrament," exclaimed the clerk. "Why, lord love you, sir, you have just been churched!" The repeal of the Test Act removed this obligation, which in so many cases, such as that of Curwood just mentioned, had degenerated into something very like a farce.—*L. T., 1933, p. 171.*

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*Judges' Work out of Court.*—It has been whispered, whether truly or not is uncertain, that one of the recommendations likely to be made by the committee recently appointed by the Lord Chancellor to inquire if, and how, greater expedition may be imported into the proceedings of the courts, is that the judges should sit longer hours than they do at present. It is true that their predecessors sat longer, but experience showed that this was not conducive to good work, and gradually a shorter working week was introduced. Some people seeing a judge rise at, or shortly after, four o'clock may be inclined to quote the refrain of Mr. T. W. Connor's humorous verses, "And his day's work is done," but in so thinking they would think wrongly. Few are aware how much of a judge's work has to be done after court hours. There are judgments to be considered and written, and this of itself occupies much time. Lord Justice Scrutton writes

all his judgments with his own hand, and in view of the number of points taken in the Court of Appeal these judgments frequently run to considerable length, a fact which shows that no little time must have been devoted to their preparation. The same may be said with regard to the considered judgments of several other occupants of the Bench. One other matter with which a judge has to occupy himself, and which can only be done after court hours, is the keeping abreast of case law. Many years ago the late Lord Bramwell, then Baron Bramwell of the Court of Exchequer, gave evidence before a commission which had been appointed to inquire into the working of the legal machine—such an inquiry seems to be called for every decade or so—and he included among the judges' duties the reading of the reports. He said this: "Lord Wensleydale told me, and my own judgment goes with it, that no judge can do his duty who does not read the reports. . . . When I was at the Bar I did not read them, and I didn't pretend to read them, and my clients knew that I didn't read them, and they took me for better or worse. But I can't serve the public in that way, and I read them now diligently and they require time." He went on to say that he did not confine his reading to one set of reports, because, as he pointed out, "you may find that one reporter is struck by one remark which he puts down and while writing it, not being an accomplished shorthand writer, something escapes his attention which the other reporter puts down." With the increased output of reports, the ground for judicial studies after court hours of those who follow the example of Lord Bramwell, and it is believed many of the present-day judges do follow it, is largely extended.—*L. T., 1933, p. 172.*

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*The U. S. President.*—One of the peculiarities in the working of the political machine in the United States is that some time elapses between the election of the President and his formal entry upon his office. As everyone knows, Mr. Roosevelt was chosen President a month or two ago, but only on Saturday last was he formally inaugurated. Another peculiarity is the fact that the person chosen as President receives no official notification of his election, nor any commission or certificate of the result of the count: he notifies himself of the honour done him, and presents himself at Washington on the 4th March to take the oath of office, this being usually administered by the Chief Justice of the Supreme Court. The tradition followed is for the new President to call upon his predecessor and the latter returns the call very shortly afterwards. Occasionally in the past there was some little friction between the outgoing and the incoming President, and in one instance the

latter declined to call upon the former, and not unnaturally the outgoing President equally declined the customary call, and indeed took a horseback ride in the suburbs while the guns were booming out welcome to the new chief of the State. *Tantaene animis caelestibus irae.*—*L. T., 1933, p. 194.*

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*His Cabinet.*—Another marked difference between American practice and that which obtains among us is in the number of those constituting the Cabinet. Complaints have been frequent in this country that the Cabinent is so large as to be both expensive and unwieldy. Discussing this subject in his monograph on Walpole, the late Lord Morley said that nowadays the number of Ministers almost necessarily included in the Cabinet has grown so large that it seems as if the result must inevitably be the formation of an interior junto, small enough to allow of deliberation and decision at close quarters. This, as he pointed out, would be no more than a return to the system of Walpole's time—a large Cabinet, but the effective body composed of himself, the Chancellor, and the two Secretaries of State. We have not quite come to that, but it is worth noting that our kin beyond sea have always favoured small Cabinets, although there, too, new developments have necessitated an increase in the number of those who sit at the official table with the President. As the late Benjamin Harrison, who had himself filled the office of President, remarked: "The 'cabinet maker' who designed the table did not allow for the growth of the official family." The President presides at Cabinet meetings; on his right sits the Secretary of State as the most important of his lieutenants; on his left sits the Secretary of the Treasury; next to the Secretary of State is the Secretary of War; and opposite to him is the Attorney-General, who appears to be always included in the Cabinet, in this again differing from the usual practice among us, although, as may be remembered, there have been several instances in recent years where the Attorney-General has been made a member of the Cabinet. Among the other members of the Cabinet in America are the Postmaster-General, the Secretary of the Navy, and the head of the Department of Agriculture. Of all these the Secretary of State is the chief, sometimes being called the head of the Cabinet, and, in fact, he is so in matters of ceremony and in the order of succession to the presidency, for he succeeds to that office in the event of the death of the President and the Vice-President. It says much for the good sense of those called to the office of President that more than once the choice of the Secretary of State has been of the man who was the chief competitor of the successful candidate. Lincoln,

for example, chose as his Secretary of State Seward—a brave act, it was said, because Lincoln could not fail to know that for a time Seward would overshadow him in the popular esteem; and it was a wise act because Seward was the best qualified at the time for the great and delicate duties of the office.—*L. T., 1933, p. 194.*

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*The Indian Proposals.*—Nearly three years have passed since the Report of the Indian Statutory Commission, of which Sir John Simon was Chairman, was issued. That Report went beyond the original scope of the inquiry, and dealt not only with the Provinces, but entered on the larger question of the Federation of the Provinces and the States in a single Government. "The ultimate constitution of India," the Commission said "must be federal, for it is only in a federal constitution that units, differing so widely in constitution as the Provinces and the States, can be brought together, while retaining internal autonomy." This extension of the task of the Commission has been accepted both by the British Government and at the Sessions of the Round Table Conference in September, 1930, and a year later; and in December, 1931, it was endorsed by both Houses of Parliament. The Proposals which have now been issued by the Government for the consideration of Parliament are intended to establish an All-India Federation. Federation elsewhere, it is pointed out, has usually resulted from a pact entered into by a number of political units, each possessed of sovereignty, or at least of autonomy, and each agreeing to surrender to the central organisation which the pact creates an identical range of powers and jurisdiction, to be exercised by it on their behalf to the same extent for each one of them individually, and for the Federation as a whole. The most familiar instance of such a Federation is afforded by the United States. But in India the process will be reversed. The Government, now centralised, will be decentralised, and its functions distributed among the Provinces and the States, except such as are retained at the centre; and as regards the retained functions, these will be exercised by the Governor-General, some on his own responsibility, and some on the advice of his Ministers. In short, the tendency is centrifugal, and not, as in the United States, centripetal.—*L. J., 1933, p. 194.*

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*A Federal Court.*—A written Constitution requires a court to interpret it. "In a Constitution," say the Proposals, "created by the federation of a number of separate political units, and providing for the distribution of powers between a Central Legislature and Executive on the one hand, and the Legislatures and Executives of the federal units on the other, a Fede-

ral Court has always been recognised as an essential element. Hence a Federal Court is to be established, and this will have both an original and an appellate jurisdiction. Under its original jurisdiction, it will determine "justiciable" disputes between the Federation and any Federal unit, or between any two or more Federal units, involving the interpretation of the Constitution Act, or any rights or obligations arising thereunder. But the limitation to justiciable disputes is not required. Official draftsman use the word too readily. All the matters specified are appropriate for determination by a Court of Justice. And there will be an appeal to the Federal Court from any High Court or State Court on the like questions. It is proposed that an appeal shall lie without leave to the Judicial Committee from a decision of the Federal Court in any matter involving the interpretation of the Constitution, but in any other case only by leave of the Court, unless special leave is granted by the Judicial Committee. As to the establishment of a Supreme Court, to hear appeals from the Provincial High Courts, Indian opinion, it is said, is far from unanimous, and this is left over for the present. Such a Court would intercept appeals to the Judicial Committee and, in general, render them unnecessary. Except under very special circumstances, litigation might well reach final decision in India.—*L. J., 1933, p. 194.*

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*Damages in Divorce.*—Recent reports in the daily newspapers tell us that large sums are being awarded in the Divorce Court as damages to injured husbands. Some people may think that juries are forgetting the old rule (of which they are no doubt always reminded) that it is not their function to punish the co-respondent for what he has done. The rule was carefully stated by Sir James Hannen in *Darbishire* v. *Darbishire and Baird*, (1890, 62 L. T. 664), where he declared that the jury should aim not at punishing the co-respondent, but at compensating the husband for what he has lost. Wives, however (like husbands), vary greatly; when the time comes to estimate their value in pounds, shillings and pence, there are difficulties which no man, and no jury, can face with confidence. Reading between the lines of Lord Merrivale's judgment in *Langrick'* v.*Langrick and Funnell*, (1920, P. 90, 89 L.J. (P.) 114), one may, perhaps, see a change of view, and say that a co-respondent who has behaved with particular cruelty or recklessness of the husband's rights, should pay heavily—as heavily as he can. The question is one of mixed law and morals. Juries who are really shocked by the wickedness of one who has broken up a happy and decent home, will, we believe, give verdicts which express their

resentment. They may decline as impossible the task of assessing the value of a wife. And if they are duly warned of their duty, it is very difficult for the Court of Appeal to interfere. To do so, they must value the wife, or wives generally, themselves.—*L. J., 1933, p. 195.*

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*Lord Tomlin of Ash.*—Lord Tomlin, the Lord of Appeal in Ordinary, has come back and down to the Chancery Division, and continues to play the part of a puisne in the place of Bennet, J., who has gone to the aid of the King's Bench Division. It will be recalled that Tomlin, J., was one of the few (Lord Wright and Lord Blackburn were others) who were promoted direct from the position of puisne to the Lords, over the heads of the Lords Justices of Appeal. He did not take the place of any other Lord; for it was he who was made seventh Lord of Appeal in Ordinary under the power conferred by sec. 2 of the Appellate Jurisdiction Act of 1929—the Act which, by sec. 1 thereof, for the first time in history, authorised the payment of salaries to two members of the Judicial Committee of the Privy Council and imposed an age limit of seventy-two.

Since his descent from the Lords, Lord Tomlin's most notable judgment is that delivered *In re Ogden*; *Brydon* v. *Samuel,* where he held that a gift by will of the testator to Sir Herbert Samuel of 4 per cent. of the testator's residuary estate "to be by him distributed amongst such political federations, associations, or bodies in the United Kingdom (other than those in the said will mentioned) having as their objects, or one of their objects, the promotion of Liberal principles in politics, as he shall in his absolute discretion select, and in such shares and proportions as he shall, in the like discretion, think fit"—is a valid and effectual gift.—*L. J., 1933, p. 206.*

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*Alone.*—It is curious that Northern Ireland has no Solicitor-General: one law officer is accounted enough. Yet in a much smaller jurisdiction, that of the County Palatine of Durham, they have not only an Attorney but a Solicitor-General.

And while in England His Majesty's Law Officers may no longer indulge in private practice, Mr. Babington is not so hampered; and enjoys the liberty of action enjoyed until fairly recent times by his English counterpart. It will be remembered that Sir Edward Clarke strongly opposed Sir Richard Webster when the old order was changed: "The question of income," said Sir Edward, "does not weigh with me a single moment; but as a member of a great profession, taking much interest in its fortunes

and pride in the position which I have been allowed to hold in it, I feel certain that the proposed changes will produce a greater expenditure of public money without any increase of public efficiency, and will, at the same time, injuriously affect the position of the Law Officers with regard to their brethren at the Bar."

By the way, what is the "pillow of the Attorney-General" in Northern Ireland? In England it was Chief Justiceship of the Common Pleas; later it became alternative—the Lord Chief Justiceship or a Law Lordship. In Northern Ireland it would be, if one may judge from brief history, a Lord Justiceship at the least.—*L. J., 1933, p. 211.*

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*Salary and Fees.*—When Bacon was Attorney-General he had a salary of 81*l.* 6*s.* 8*d.* a year, but his fees as Attorney were more considerable. "I shall now again make oblation to your Majesty," he wrote to King James I, "first, of my heart; then of my service; thirdly, of my place of Attorney, which I think is honestly worth 6,000*l.* per annum." That he must have derived almost the whole of his income from fees is pointed out in Norton-Kyshe's *Law Relating to the Attorney-General and Solicitor-General.* It is there he mentions that the actual salary of the Attorney was 81*l.* 6*s.* 8*d.*; the Solicitor's, 70*l.*; the King's Serjeant's. 41*l.* 6*s.* 10*d.*; and the King's Advocate's, 20*l.*—*L. J., 1933, p. 211.*

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*An Irish to a Scottish War Lord.*—Although the Lord Chief Justice of Northern Ireland is entitled to sit as a member of the Judicial Committee, because he is a Privy Councillor who holds high judicial office, Ireland is at present without representation amongst the seven Lords of Appeal in Ordinary who receive 6,000*l.* a year (less cuts) in respect of their judicial services in the House of Lords, and who sit without extra remuneration on the Judicial Committee of the Privy Council. Five of the seven are of English legal extraction—though Lords Atkin and Russell are of Irish antecedents, and Lord Blanesburgh hails from Scotland. Lords Wright and Tomlin are "pure" English. Lords Thankerton and Macmillan are Scottish in law and ancestry.

Lord Thankerton is the son of that Lord Watson who was also a Lord of Appeal, and whose talkativeness the Irish Lord Morris and Killanin, also of appeal, could not abide. It is recorded of Lord Morris that once, on the conclusion of a long appeal, he solemnly recommended Lord Watson to follow the advice given by a parish priest to a talkative woman—to take a sup of holy water in her mouth, sit still, and take care not to swallow it. Lord Watson's reply, if any, is unknown.—*L. J., 1933, p. 211.*

*Montaigne's Encomium on the Chinese.*—At the moment when happenings in China have turned the eyes of the world to that distant land, it is interesting to find that Montaigne, who did not limit his consideration to the affairs of his own country, found something extremely praiseworthy in the then administration of the Celestial Empire. China, he says, which is without any acquaintance with France and its laws and customs, nevertheless surpasses that western realm in several aspects, a circumstance which taught him the wisdom of looking far beyond the confines of his native land and ascertaining the rules of conduct and law which prevail in other countries. In China Montaigne discovered there was this excellent administrative rule enjoined on the officers deputed to visit periodically the different provinces of the realm, that they should not only punish those who had been guilty of malversation in the charges committed to them, but should reward those who had not only carried out their duties but had been zealous in good work beyond what was expected of them. Misdeeds are always conspicuous; good work is more rarely visible to inspecting eyes and is not always rewarded as it deserves. In China, if Montaigne was not misinformed, it was otherwise, hence his commendation.—*L. T., 1933, p. 232.*

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*Judicial Greeting to New Silks.*—The formal call within the Bar of newly-appointed King's Counsel, although giving pleasure to onlookers, especially to those related to the silks, rarely receives any additional interest so far as the Bench is concerned, beyond the naming each new K. C. in turn and requesting him, first to take his seat within the Bar, and then inquiring if he "moves." Lord Justice Scrutton has once or twice on recent occasions broken through this judicial taciturnity and extended to one of the group a greeting that has doubtless gladdened his heart. Some little time ago a King's Council, who, as a junior, had been almost exclusively briefed by the railway companies, was asked by the Lord Justice if he "or any of his numerous railway companies" moved. When the son of a former member of the Court of Appeal was called, Lord Justice Scrutton expressed his pleasure in greeting the new silk in the front row. In the case of another, he recalled that he himself was called within the Bar on the same day as the new silk's father. Last week, when Mr. Paley Scott was invited to take his seat within the Bar, the Lord Justice expressed his satisfaction in seeing Mr. Scott in the front row. Greetings such as these add something of a human and pleasurable interest to the ceremony which is gratifying.—*L. T., 1933, p. 232.*

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*New Wine in Old Bottles.*—Time and again it has been made a reproach to lawyers that they use language in deeds remote from that of ordinary life and hard to be understood. There may be some truth in the indictment, but lawyers are by no means the sole transgressors in this matter. Business men, who are so apt to plume themselves on their businesslike methods, are not beyond criticism on the score of the awkwardness and unintelligibility of their documents. Sometimes, too, they are found putting new wine into old bottles, a proceeding condemned long ago. Only last week a case was heard in one of the Courts, the question turning on a policy of insurance taken out by contractors employed to lay some concrete flooring in a large factory in Birmingham, who desired to be indemnified against claims in the event of any of the work turning out to be defective. The contractors went to Lloyds and duly obtained a policy, but, will it be believed, it was on one of the ordinary marine forms which provided for the name of the ship being inserted, the name of the master, the destination and purpose of the voyage, and so on; all these clauses were retained, but to meet the particular risk typewritten clauses were inserted. Can one imagine a solicitor who has been instructed to draw a will doing so on printed form of a writ? And yet business men pride themselves on their superior practicality to members of the Legal Profession!—*L. T., 1933, p. 233.*

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*Law and Ethics.*—Mr. Augustine Birrell tells a story that in the old days before the fusion of law and equity the disappointed suitor as he emerged from a Common Law Court might be heard to say, "Well, if this is law, give me equity"; while if purchance it was in a Chancery Court that he had suffered reverse, his language was, "If this is equity, give me law". He had his own ideal of justice to which as it seemed to him neither tribunal conformed. Lord Macmillan, who is not merely a distinguished Lawyer, but a keen student of moral philosophy, in a lecture recently delivered to the Associated Societies of the University of Edinburgh, on the subject of law and ethics, speaks of the contrast often drawn in popular parlance between law and justice, and he, too, conjures up the picture of an indignant citizen, smarting under a judicial decision, saying, "It may be law, but it is not justice". It may well be so, for, as the learned lord went on to remark, not infrequently judges have been heard saying that they regretfully found themselves compelled by the law to pronounce a particular decision which obviously offended their sense of fairness, and at the same time giving forth a hint that it was for the Legislature to intervene and redress the law's injustice. Lord Macnaghten once said, "It is a

public scandal when the law is forced to uphold a dishonest act." Happily, the occasions when this conclusion is forced upon the courts are not frequent, and in the main it is the case that law and ethics live together in unison. Lord Macmillan cites three comparatively recent cases in which, as he says, the courts have recognised, as against what some might regard as strict law, the moral virtue of altruism: *Wilkinson* v. *Kinneil Cannel & Coking Co.* (1897), 24 Rettie 1001; *Brandon* v. *Osborne, Garrett & Co.* [1924] 1 K. B. 548; and *Gregory* v. *Miller* (1933), *The Times* of 9th February. In concluding an admirable address, Lord Macmillan uttered these comforting words: "The surest hope of promoting the welfare of the individual and of the community lies in the wise co-operation of law and ethics."—*S. J., 1933, p. 205.*

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*Recorderships.*—During the last few weeks, owing to death and other causes, there have been numerous changes in the personnel of the Recorders throughout the country. So long have we been accustomed to the name thus given to the judge of the city or borough quarter sessions that we rarely give a thought to the fact that his work is now somewhat remote from that which originally must have given him this title. In the quarter sessions he sits as the single judge; as the late F. W. Maitland said: "he is no amateur justice," for he must be a barrister of five years' standing; he is the recipient of a salary, not large, indeed, save in the larger cities, and he is appointed by the Home Secretary. In the City of London the Recorder holds a whole-time post, which involves the exercise of jurisdiction both in the Central Criminal Court and sometimes also in the Mayor's Court. Outside London the position of the Recorder struck a foreign observer as highly anomalous. As he pointed out, the Recorder might one day be sitting as judge in the quarter sessions court, and another day be present in the same town appearing as advocate before a High Court judge. That is true, but English law and administration are full of anomalies, and yet somehow justice is done and we all go on quite comfortably.—*S. J., 1933, p. 206.*

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## BOOK REVIEWS.

THE LAW AND PRACTICE OF LIFE ASSURANCE AND PROVIDENT INSURANCE IN INDIA, by Taradas Dutt, M.A., B.L., Advocate, Calcutta. Price Rs. 8.

It is with pleasure that we welcome this work on the above subject by Mr. Taradas Dutt of the Calcutta Bar on a subject of great importance but one in which there is a paucity of Indian legal text-books. There are well-known English text-books on the

subject but so far as we are aware there is none which considers the several points of difference in this branch of the law with reference to the peculiarities of the systems of law obtaining in this country. The learned author has in the course of his work relied largely upon the English decisions and the statements of leading English writers. Though the Indian decisions on the subject are few, he has referred to all of them in their proper places. Wherever there is a statute or any other law in India which renders any English rule inapplicable, the learned author has noticed the same. He has also incorporated the rules made by the Governor-General in Council and by the various Local Governments, excepting the Punjab, under the Indian Life Assurance Companies Act and the Provident Insurance Societies Act.

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THE LAW OF PARTNERSHIP, by Gobind Ram Khanna, M.A., LL.B., Advocate, Lahore. Price Rs. 5.

In this commentary of the Indian Partnership Act, the learned author has given under the various sections of the Act an analytical and explanatory exposition of the Law of Partnership in British India. The principles of this branch of the law have been elucidated by illustrations which have been drawn both from the English and the Indian authorities. To facilitate a comparative study, the provisions of the English and the earlier Indian law have also been set out. The appendices give all the useful information on allied topics. Of these, Appendix A deals with the practice and procedure in suits relating to partnership. We believe that this book will be found useful to the members of the bench and the bar.

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PRINCIPLES OF THE LAW OF PARTNERSHIP, by Manohar Lal Sachdeva, M.A., LL.B., Advocate, Lahore. Price Rs. 4.

This small book of less than 200 pages deals with the principles of the law of partnership in the form of chapters and not by way of commentary to the sections of the Indian Partnership Act. The headings of the chapters follow mostly those of the Act itself and the subjects are dealt with so as to be intelligible to even lay readers. Naturally, in a book of this description, all the decisions on the subject cannot be thrust in and the learned author has not attempted to do it. The leading decisions are given in their proper places. We trust that the book will be found useful to students and businessmen for whom it is mainly intended.

[END OF VOL. LXIV.]